CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 248.

THOMAS H. HULBERT, PLAINTIFF IN ERROR,

vs.

THE CITY OF CHICAGO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

FILED APRIL 29, 1905.

(19,736.)

(19,736.)

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a UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Illinois, Greeting:

Because of the record and proceedings, and also in the rendition of the judgment of a plea which is in the Supreme Court of the State of Illinois, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Thomas H. Hulbert, defendant and plaintiff in error, and the City of Chicago, plaintiff and defendant in error, wherein was drawn in question the construction of a clause of the Constitution of the United States and the decision was against the right, title, privilege, or exemption specially set up or claimed under such clause of the said Constitution, a manifest error has happened, to the great damage of the said plaintiff in error, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 28th day of March, A. D. 1905.

[SEAL.] JAMES T. JONES,
Clerk of the Circuit Court of the United States for the Southern District of Illinois.

Allowed by—
JAMES B. RICKS,
Chief Justice of Supreme Court of Illinois.

Filed Mar. 28, 1905.

C. MAMER,
Clerk of Supreme Court.

b In the Supreme Court of Illinois.

THOMAS H. HULBERT
vs.
THE CITY OF CHICAGO.

Appeal County Court, Cook.

I, Christopher Mamer, Clerk of said Supreme Court, Do Hereby Certify that on the Twenty-eighth day of March, in the year of our

Lord One Thousand Nine Hundred and Five, a copy of the foregoing Writ of Error for Defendants in Error was lodged in my office at Springfield, Illinois.

Witness my hand and the seal of said Supreme Court, this Twenty-fourth day of April, A. D. 1905.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

CHRISTOPHER MAMER,
Clerk of the Supreme Court.

c UNITED STATES OF AMERICA, ss:

To the City of Chicago, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the State of Illinois, wherein Thomas H. Hulbert is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the plaintiff in error in that behalf.

Witness the Honorable James B. Ricks, Chief Justice of the Supreme Court of the State of Illinois, this 28th day of March in the year of our Lord one thousand nine hundred and five.

JAMES B. RICKS,
Chief Justice Supreme Court of Illinois.

Service of the above writ is hereby accepted by receipt of copy of same this 30th day of March, 1905.

ROBERT REDFIELD,
Attorney for the City of Chicago.

Filed Mar. 31, 1905.

C. MAMER,
Clerk of Supreme Court.

d In the Supreme Court of Illinois.

THOMAS H. HULBERT
vs.
THE CITY OF CHICAGO.

Appeal County Court, Cook.

I, Christopher Mamer, Clerk of said Supreme Court, Do Hereby Certify that on the Thirty-first day of March, in the year of our Lord One Thousand Nine Hundred and Five, a copy of the foregoing Citation was lodged in my office, at Springfield, Illinois.

Witness my hand and the seal of said Court, this Twenty-fourth day of April, A. D. 1905.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

CHRISTOPHER MAMER,
Clerk of the Supreme Court.

1 In the Supreme Court of the State of Illinois.

THOMAS H. HULBERT
vs.
THE CITY OF CHICAGO.

Appeal County Court, Cook.

I, Christopher Mamer, Clerk of the Supreme Court of Illinois, and keeper of the records and files thereof, by virtue of the foregoing Writ of Error and in obedience thereto, Do Hereby Certify that the following pages numbered from One (1) to One Hundred and Eighty-two (182) both inclusive contain a true, perfect and complete copy of the record and proceedings had in the above entitled cause in said Court; including a certified copy of the opinion of the Court; and that pages One Hundred and Eighty-one (181) to One Hundred and Eighty-two (182) both inclusive, contain a true and correct copy of the Assignment of Errors upon said record filed in said Court, on the Twenty-eighth day of March, A. D. 1905, the original of which remain on file and of record in my said office.

In Testimony Whereof, I have hereunto set my hand and caused the seal of the said Supreme Court of Illinois to be hereunto affixed at Springfield, this Twenty-fourth day of April, in the year of our Lord one thousand nine hundred and five.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

CHRISTOPHER MAMER,
Clerk of the Supreme Court.

2 In the Supreme Court of the State of Illinois.

Be it remembered, to-wit, on the Fifth day of October, in the year of our Lord one thousand nine hundred and four, there was filed in the office of the Clerk of the Supreme Court of the State of Illinois a certain transcript of record which is in the words and figures following, to-wit:—

3 *Placita.*

County Court of Cook County.

UNITED STATES OF AMERICA.

STATE OF ILLINOIS, *County of Cook, ss:*

Pleas, before the Honorable Linus C. Ruth, County Judge of Du Page County, presiding as Judge of the County Court of Cook County, at the request and in the absence of the Honorable Orrin N. Carter, sole presiding Judge of the County Court of Cook County, in the State of Illinois, at a regular term of said County Court of Cook County, begun and holden at the Court House in the City of Chicago, in said County and State, on the second Monday, being the 9th day of May, in the year of our Lord one thousand nine hundred and four and of the Independence of the United States of America, the one hundred and twenty-eighth.

Present: The Honorable Linus C. Ruth, acting Judge of the County Court of Cook County; Thomas E. Barrett, Sheriff of Cook County.

Attest: PETER B. OLSEN, *Clerk.*

Be it remembered that heretofore, to wit: on the 18th day of February, in the year of our Lord one thousand nine hundred and four, the same being one of the days of the February Term of the County Court of Cook County, the following Petition was filed with the Clerk of said Court in words and figures, to wit:

4 STATE OF ILLINOIS, *County of Cook, ss:*

To the Honorable, the County Court of Cook County, Illinois:

Your petitioner, the City of Chicago, respectfully shows that heretofore, to-wit: on the 18th day of January, A. D. 1904, the City Council of said City did pass an ordinance providing that Drake Avenue, from the North curb line of West Fullerton Avenue to the Southwesterly curb line of Milwaukee Avenue be improved by constructing a granite concrete combined curb and gutter, graded and paved with asphalt, a copy of which said ordinance, certified by the City Clerk under corporate seal, together with a copy of the recommendation of the Board of Local Improvements of the City of Chicago, and of the estimate of the cost of the said improvement, as approved by said Council, is hereunto attached and made part hereof.

Your petitioner prays that steps be taken to levy a special assessment for said improvement in accordance with the provisions of said ordinance, and in the manner prescribed by law.

CITY OF CHICAGO,
By EDGAR B. TOLMAN,
Corporation Counsel and Attorney for the
Board of Local Improvements.

5 *Recommendation, Estimate, and Ordinance.*

Recommendation by Board of Local Improvements.

To the Mayor and Aldermen of the City of Chicago, in City Council Assembled:

We hereby submit an ordinance for the Improvement, Constructing a granite concrete Combined Curb and Gutter on Cinders, grading and paving with asphalt on six inches of Portland Cement Concrete, swept with natural hydraulic Cement, The Roadway of Drake Avenue from the North Curb line of West Fullerton Avenue to the Southwesterly Curb line of Milwaukee Avenue and also the Roadways of all intersecting Streets and Alleys extended from the Curb line to the Street line produced on each side of said Drake Avenue between said points, (except the Roadway intersection of West Diversey Avenue with Drake Avenue,) in the City of Chicago, County of Cook and State of Illinois, together with an estimate of the cost of said improvement, and recommend the passage of said ordinance, and the making of the improvement contemplated therein.

Respectfully submitted,

A. M. LYNCH,
JOHN ERICSON,
GEO. A. SCHILLING,
PETER KIOLBASSA,
JOHN A. MAY,
Board of Local Improvements of the City of Chicago.

Dated, Chicago, January 18, A. D. 1904.

6 *Estimate of Engineer.*

To the Board of Local Improvements of the City of Chicago, and to the Mayor and Aldermen of the City of Chicago, in City Council Assembled:

The Board of Local Improvements of the City of Chicago having adopted a resolution that the Roadway of Drake Avenue, from the North curb line of West Fullerton Avenue to the Southwesterly Curb line of Milwaukee Avenue, and also the roadways of all intersecting Streets and Alleys Extended from the Curb line to the Street line produced on each side of said Drake Avenue between said points (Except the Roadway intersection of West Diversey Avenue with Drake Avenue) have a Granite Concrete Combined Curb and Gutter constructed on Cinders, be graded and paved with Asphalt on six inches of Portland Cement Concrete, swept with natural hydraulic cement, and presented to the City Council of the City of Chicago a recommendation that such local improvement be made.

* * * * * * *

I hereby submit an estimate of the cost of such improvement, including labor, materials and all other expenses attending the same, as provided by law, viz:

Estimate.

Granite Concrete Combined Curb and Gutter on Cinders 7126 Lineal Feet at 70c	$4,988.20
Paving with Asphalt on 6 inches of Portland Cement Concrete swept with natural hydraulic Cement, 11349 Sq. Yds. at $2.50	$28,372.50
Adjustment of Sewers, Catch-Basins and Manholes	$1,139.30
Total	$34,500.00

And I hereby certify that in my opinion the above estimate does not exceed the probable cost of the above proposed improvement.

C. D. HILL,

Engineer of the Board of Local Improvements.

Dated, Chicago, January 18, A. D. 1904.

7 An ordinance for the improvement, constructing a granite concrete combined curb and gutter, grading and paving of the roadway of Drake avenue from the north curb line of West Fullerton avenue to the south westerly curb line of Milwaukee avenue, and also the roadways of all intersecting streets and alleys extended from the curb line to the street line produced on each side of said Drake avenue between said points (except the roadway intersection of west Diversey avenue with Drake avenue), in the city of Chicago, county of Cook and State of Illinois.

Be it ordained by the city council of the city of Chicago:

SECTION 1. That a local improvement shall be made within the City of Chicago, in said County and State, the nature, character, locality and description of which local improvement is as follows, to-wit:

That the roadway of Drake Avenue, from the North curb line of West Fullerton Avenue to the Southwesterly curb line of Milwaukee Avenue, said roadway being thirty feet in width, and also the roadways of all intersecting streets and alleys extending from the curb line to the street line produced on each side of said Drake Avenue, between said points, except as hereinafter specifically provided, be and the same are hereby ordered improved as follows:

A granite concrete combined curb and gutter shall be constructed on each side of said roadway of said Drake Avenue, between said points, (except the roadway intersection of West Diversey Avenue with Drake Avenue, and except across the roadways of all intersecting streets and all the intersecting alleys between said points) in such a manner that the roadway face of the curb shall be parallel with and fifteen feet from the center line of said Drake Avenue; and a

8 granite concrete combined curb and gutter shall be constructed on each side of the roadways of all intersecting

streets and alleys extended from the curb line to the street line produced on each side of said Drake Avenue, between said points, (except the roadway intersection of West Diversey Avenue with Drake Avenue) in such a manner that the roadway face of the curb shall conform with the curb line on each side of all said intersecting streets, and in such a manner that the back of the curb shall conform with the alley line produced on each side of all intersecting alleys between said points.

Said combined curb and gutter shall be made as follows, to-wit: The concrete to be used shall consist of the best quality of Portland cement, mixed with fine crushed granite in the proportion of one part cement and two parts fine granite, into which shall be incorporated four parts of broken granite of a size to pass through a ring of one inch internal diameter. The cement shall be mixed thoroughly with fine crushed granite, after which it shall be moistened with water to form a mortar, and into which shall be incorporated the four parts of broken granite, as specified above, and rammed into forms until solid.

The material to be used in finishing the surface of said combined curb and gutter shall consist of the best quality of Portland cement, mixed with finely crushed granite, in the proportion of two parts cement and three parts granite, which, after being moistened with water to form a mortar, shall be evenly spread over the surface of said combined curb and gutter to a thickness of three-eighths of an inch, and so as to insure a smooth and even surface on the face of the curb and gutter flags, after being evenly troweled and finished with a broom.

The curb shall be seven inches thick and the height at the back shall vary from fourteen inches at the catch-basin inlets to nine inches at the summits, and the gutter flags shall be eighteen inches in width and five inches in thickness, the upper roadway edge of the curb shall be rounded to a true arch of a circle having a radius of one and one-half inches.

Said combined curb and gutter shall be constructed upon a bed of cinders six inches in depth, after being flooded with water and thoroughly compacted to an even surface, and shall be back-filled with earth free from animal or vegetable matter. Said filling to be four feet wide at the top of the curb and even therewith and to slope down at the rate of one and one-half feet horizontal to one foot vertical.

Said combined curb and gutter shall be so constructed that the upper surface of the gutter flags shall conform to the surface of the finished roadway as hereinafter described, and the top edge of the curb shall coincide with the grade of said Drake Avenue between said points, which grade is hereby established as follows, to-wit:

Intersection of Milwaukee Avenue 18.2 feet above datum.
Intersection of Wolfram Street, 18.4 feet above datum.
Intersection of West Diversey Avenue, 18.5 feet above datum.
Intersection of Schubert Avenue, 18.5 feet above datum.
Intersection of West Wrightwood Avenue, 19.5 feet above datum.
Intersection of West Dunning Street, 20.0 feet above datum.

Intersection of West Fullerton Avenue, 20.0 feet above datum.

The above heights as fixed shall be measured from the plane of low water in Lake Michigan of A. D. 1847, as established by the Trustees of the Illinois and Michigan Canal, and adopted by the late Board of Drainage Commissioners and by the late Board of Public Works of the City of Chicago, and now represented by the ordinance of July 11, A. D. 1898, relating to the corrected elevation of
10 the old Lind Block bench mark, which determines the base or datum for city levels.

The said roadway of said Drake Avenue, between said points, and also the roadways of all intersecting streets and alleys extended from the curb line to the street line produced on each side of said Drake Avenue between said points, (except the roadway intersection of West Diversey Avenue with Drake Avenue) shall be so graded that after being thoroughly puddled and rolled with a roller of ten tons weight until the roadbed is thoroughly compacted, and after the pavement hereinafter described shall have been placed thereon, the surface of the pavement at the center of the finished roadway of said Drake Avenue and the center of the finished roadways of all intersecting streets extended from the curb line to the street line produced, on each side of said Drake Avenue, shall coincide with the established grade of said Drake Avenue hereinbefore described, and the surface of the said finished roadway at the summit in the gutter between catch-basins and adjoining the roadway face of the curb shall be four inches below said established grade, and the surface of the finished roadway at the catch-basin inlets in the gutters adjoining the roadway face of the curb shall be nine inches below said established grade.

The slope of the gutters adjoining the roadway face of said curb shall be uniform from the summit to the catch-basins, and a transverse section of said finished roadway and said gutter flags shall be an arc of a circle passing through the said gutter grades and the grade of the center of said finished roadway at every part of said Drake Avenue, and at every part of all intersecting streets between said points.

The surface of the finished pavement in all intersecting alleys hereinbefore specified shall be four inches below the top of
11 the curb on each side of said alley intersection, at the street line produced of said Drake Avenue, and shall slope thence at a uniform grade to its intersection with the gutter hereinbefore described.

Upon the roadbed thus prepared between said points and between said gutter flags shall be spread a layer of Portland cement concrete six inches in thickness. The cement to be used shall be so ground that ninety-two per cent. will pass through a standard number 100 sieve having 10,000 meshes per square inch.

Briquettes made from a mortar composed of one part cement and three parts torpedo sand exposed to the air for one day and immersed in water for six days shall develop an ultimate tensile strength of 200 pounds per square inch.

One part cement which will stand the above test and comply with

above requirement and three parts torpedo sand shall be oughly mixed dry and then made into a mortar with the least ible amount of water.

even parts of the best quality of broken limestone, or other stone h shall be equal in quality for concrete purposes, of a size that pass through a ring of two inches internal diameter and be held ring of one-half inch internal diameter, all of which stone shall oroughly cleaned, free from all foreign substances, and drenched water, shall then be incorporated immediately with the mortar; batch of concrete shall be thoroughly mixed and at once spread the surface of said roadbed, and thoroughly compacted by ming until free mortar appears on the surface. The surface of layer of concrete shall be parallel with and three and one-half es below the top of the finished pavement.

pon the concrete foundation as above specified shall be laid a der" course, composed of broken limestone of a size known as "small concrete" and asphaltic cement. The stone shall be heated and thoroughly mixed with the asphaltic cement in the proportion of fifteen gallons of asphaltic cement to one c yard of stone. This binder shall be spread on the base above rib ed and, while in a hot and plastic condition, shall be rolled l it has a uniform thickness of one and one-half inches. The er surface shall be exactly parallel with and two inches below the hed surface of the pavement.

pon this "binder" course shall be laid the wearing surface of ement proper, which shall be composed of asphaltic cement nteen parts, sand seventy-three parts, and pulverized carbonate ime ten parts. The sand and asphaltic cement shall be heated rately to a temperature of three hundred degrees Fahrenheit. pulverized carbonate of lime shall be mixed with the sand and e ingredients then mixed with the asphaltic cement at the above perature in an apparatus which shall effect a perfect mixture.

ll asphaltum used in the making of the asphaltic cement for the binder and the wearing surface, shall be asphaltum obtained n Pitch Lake in the Island of Trinidad, or asphaltum which shall qual in quality for paving purposes to that obtained from Pitch e in the Island of Trinidad.

he material for pavement, when mixed as above, shall be spread temperature of two hundred and fifty degrees Fahrenheit. It ll be carefully spread by means of hot iron rakes in such a man- as to give a uniform and regular grade to such a depth, that after ing received its ultimate compression, it will have a thickness of inches.

he entire surface of the roadway thus improved shall then be pressed by hand rollers, after which natural hydraulic cement, in the proportion of one barrel to each one thousand square yards of surface shall be swept over it, and the whole then thoroughly compressed by rolling with a steam roller of ten s weight, the rolling being continued for five hours for each one sand square yards of surface.

hat the several manholes and catch-basins located along the line

of said improvement shall be raised or lowered as may be necessary to make them conform to the finished roadway of said Drake Avenue as above specified.

Said work to be done under the superintendence of the Board of Local Improvements of the said City of Chicago.

SECTION 2. That the recommendation of the Board of Local Improvements of the City of Chicago, providing for said improvement, together with the estimate of the cost thereof made by the Engineer of said Board, both hereto attached, be and the same are hereby approved.

SECTION 3. That said improvement shall be made and the whole cost thereof be paid for by special assessment in accordance with an Act of the General Assembly of the State of Illinois, entitled, "An Act Concerning Local Improvements," approved June 14, A. D. 1897, and amendments thereto.

SECTION 4. That the aggregate amount herein ordered to be assessed against the property, and also the assessment on each lot and parcel of land therein assessed shall be divided into five installments in the manner provided by the statute in such cases made and provided, and each of said installments shall bear interest at the rate of five per centum per annum according to law until paid.

SECTION 5. And for the purpose of anticipating the collection of the installments of said assessments for said improvement, bonds shall be issued payable out of said installments, bearing interest at
the rate of five per centum per annum, payable annually,
14 and signed by the Mayor and by the President of the Board of Local Improvements, countersigned by the City Comptroller, and attested by the City Clerk under the corporate seal of the City of Chicago. Said bonds shall be issued in accordance with and shall in all respects conform to the provisions of the Act of the General Assembly of the State of Illinois, entitled, "An Act Concerning Local Improvements," approved June 14th, A. D. 1897, and the amendments thereto.

SECTION 6. That the Attorney of said Board be and he is hereby directed to file a petition in the County Court of Cook County, Illinois, in the name of the City of Chicago, praying that steps may be taken to levy a special assessment for said improvement in accordance with the provisions of this ordinance, and in the manner prescribed by law.

SECTION 7. That all ordinances or parts of ordinances conflicting with this ordinance be and the same are hereby repealed.

SECTION 8. This ordinance shall be in force from and after its passage.

15 STATE OF ILLINOIS, *County of Cook, ss:*

I, Fred G. Bender, City Clerk of the City of Chicago, do hereby certify that the foregoing is a true and correct copy of Document No. 3,749 and of the endorsements thereon, the same being a certain Recommendation, Estimate and Ordinance now on file at my office, which Ordinance was passed and Estimate approved by the

City Council of the City of Chicago, aforesaid, on the 18th day of January, 1904, and deposited in my office on the 18th day of January, 1904.

I do further certify that the said Ordinance was delivered to the Mayor of said City, after the passage of said Ordinance by the City Council, without delay, by the City Clerk of said City; and that the said Mayor failed to return the same to the said Council at its next regular meeting, occurring more than five days after the passage of said Ordinance, with his objections thereto, whereupon the said ordinance took effect in like manner as if he had approved the same.

I do further certify that the foregoing recommendation of the Board of Local Improvements is a true and correct copy of the same, as presented to the said City Council.

I do further certify that the foregoing estimate of the Engineer of the Board of Local Improvements is a true and correct copy of the Estimate of the cost as approved by the said City Council.

I do further certify that the originals, of which the foregoing are true copies, are entrusted to my care for safe keeping, and that I am the keeper of the same.

In witness whereof, I have hereunto set my hand and
[SEAL.] affixed the corporate seal of the City aforesaid, at the said City, in the County and State aforesaid, this 6th day of February, 1904.

FRED G. BENDER,
City Clerk.

16 And afterwards, to-wit, on the 18th day of February, A. D. 1904, the following among other proceedings were had by and before said Court and entered of record, to-wit:—

17 County Court, Cook County.

In the Matter of the Petition of the City of Chicago for a Special Assessment for the Cost of Curbing, Grading, and Paving with Asphalt, Drake Avenue, from Fullerton Avenue to Milwaukee Avenue. No. 28,922.

The City of Chicago this day filed its petition herein praying that steps may be taken to levy a special assessment for the above improvement.

It is considered and ordered by the Court, that John A. May, Superintendent of Special Assessments of the said City of Chicago, be and he is hereby ordered and directed to make a true and impartial assessment of the cost of said improvement upon the said City of Chicago, and the property specially benefited by such improvement, and return the same to this court.

18 And afterwards, to-wit, on the 26th day of March, A. D. 1904, there was filed with the Clerk of said Court, a certain Assessment Roll in words and figures as follows, to-wit:

19 Docket No. 28922.

Report and Assessment Roll for Curbing, Grading, and Paving with Asphalt Drake Avenue from West Fullerton Avenue to Milwaukee Avenue.

20 Report and Assessment Roll, Made by John A. May, Superintendent of Special Assessments of the City of Chicago, appointed by the County Court of Cook County to make a true and impartial assessment of the cost of curbing with a granite concrete combin-d curb and gutter, grading and paving with asphalt Drake Avenue from the north curb line of West Fullerton Avenue to the southwesterly curb line of Milwaukee Avenue in the City of Chicago, County of Cook, and State of Illinois, in accordance with the Ordinance recommended, and estimate of the Engineer of the Board of Local Improvements submitted by the Board of Local Improvements, and passed and approved by the City Council of the City of Chicago, on January 18th A. D. 1904, recited in the petition of the City of Chicago, Docket No. 28,922 of said Court; upon the City of Chicago, and the property benefited by such improvement, together with a list of all the lots, blocks, tracts and parcels of land assessed for the proposed improvement; the amount assessed against each, the name of the person who paid the taxes on each such parcel during the last preceding calendar year in which taxes were paid, the residence of the person so paying the taxes on each such parcel so far as the same can be found after diligent inquiry:

21 **Warrant No. —. Docket No. 28922.**

Report and Assessment Roll for Curbing, Grading, and Paving with Asphalt Drake Avenue from West Fullerton Avenue to Milwaukee Avenue.

Sheet No. 1.

Name and residence of person who paid the taxes during the last preceding calendar year in which taxes were paid.	Part of lot or land.	Sub lot.	Lot.	Block.	Installment No.	Assessment.	Assessment as confirmed.
						Dollars. Cts.	*Dollars. Cts.*
Subdivision of N. W. ¼, N. W. ¼, section 26, town 40 north, range 13 east, of the 3rd principal meridian.	S. E. ¼,				1		
					2		
					3		
			Lot	Blk.	4		
				1	5		
					Total.		
T. H. Hulbert, 6 Madison St.	W. ½		6	"	1	1 80	
					2	1 80	
					3	1 80	
					4	1 80	
					5	1 80	
					Total.	9 00	
" "			7	"	1	3 70	
					2	3 70	
					3	3 70	
					4	3 70	
					5	3 70	
					Total.	18 50	
" "			8	"	1	3 80	
					2	3 80	
					3	3 80	
					4	3 80	
					5	3 80	
					Total.	19 00	
" "			9	"	1	3 90	
					2	3 90	
					3	3 90	
					4	3 90	
					5	3 90	
					Total	19 50	
" "			10	"	1	4 00	
					2	4 00	
					3	4 00	
					4	4 00	
					5	4 00	
					Total.	20 00	
" "			11	"	1	76 31	
					2	76 31	
					3	76 31	
					4	76 31	
					5	76 31	
					Total.	381 55	
" "			18	"	1	33 07	
					2	33 07	
					3	33 07	
					4	33 06	
					5	33 07	
					Total.	165 35	
					1		
					2		
					3		
					4		
					5		

22 **Warrant No. —. Docket No. 280[illegible].**

Report and Assessment Roll.

Sheet No. 14.

Name and residence of person who paid the taxes during the last preceding calendar year in which taxes were paid.	Part of lot or land.	Sub-lot.	Lot.	Block.	Instalment No.	Assessment.	Assessment as confirmed.
						Dollars. Cts.	*Dollars. Cts.*
Subdivision of S. W. ¼, S. W. ¼, section 30-40-13 (Cont'd).	S. E. ¼				1		
					2		
					3		
					4		
				1	5		
Thos. H. Hulbert, c Madison St	.....	.....	29	"	1	31 80	
					2	31 80	
					3	31 80	
					4	31 80	
					5	31 80	
					Total	159 00	
" "	.....	.....	1	2	1	26 34	
					2	26 34	
					3	26 34	
					4	26 34	
					5	26 34	
					Total	131 70	
" "	.....	.....	2	"	1	4 00	
					2	4 00	
					3	4 00	
					4	4 00	
					5	4 00	
					Total	20 00	
" "	.....	.....	3	"	1	3 90	
					2	3 90	
					3	3 90	
					4	3 90	
					5	3 90	
					Total	19 50	
" "	.....	.....	4	"	1	3 80	
					2	3 80	
					3	3 80	
					4	3 80	
					5	3 80	
					Total	19 00	
" "	.....	.....	5	"	1	3 70	
					2	3 70	
					3	3 70	
					4	3 70	
					5	3 70	
					Total	18 50	
" "	E. ½	.....	6	"	1	1 80	
					2	1 80	
					3	1 80	
					4	1 80	
					5	1 80	
					Total	9 00	
" "	.....	.....	30	"	1	31 80	
					2	31 80	
					3	31 80	
					4	31 80	
					5	31 80	
					Total	159 00	
					1		
					2		
					3		
					4		
					5		

23

Warrant No. —. Docket No. 28922.

Report and Assessment Roll.

Sheet No. 15.

Name and residence of person who paid the taxes during the last preceding calendar year in which taxes were paid.	Part of lot or land.	Sub-lot.	Lot.	Block.	Instalment No.	Assessment	Assessment as confirmed.
						Dollars. Cts.	*Dollars. Cts.*
Subdivision of N. W. ¼, N. W. ¼, section 20-40-13 (Cont'd).	s. E. ¼				1		
					2		
					3		
					4		
					5		
Thos. H. Hulbert, 6 Madison st.	s. 24 ft.	.....	31	2	1	30 83	
					2	30 53	
					3	30 53	
					4	30 53	
					5	30 53	
					Total.	152 65	
" "	.....	.....	38	"	1	33 07	
					2	33 07	
					3	33 07	
					4	33 07	
					5	33 07	
					Total.	165 35	
" "	.....	.....	39	"	1	33 07	
					2	33 07	
					3	33 07	
					4	33 07	
					5	33 07	
					Total.	165 35	
					1		
					2		
					3		
					4		
					5		
					Total.		
					1		
					2		
					3		
					4		
					5		
					Total.		
					1		
					2		
					3		
					4		
					5		
					Total.		
					1		
					2		
					3		
					4		
					5		
					Total.		
					1		
					2		
					3		
					4		
					5		

24	Forwarded.	Assessment.
		Dollars. Cts.
	Proportion of the total cost of the improvement which is estimated will be of benefit to the property to be benefited by said improvement, and apportioned to and assessed upon such property	34,500 00
	Proportion of the total cost of the improvement which will be of benefit to the public, and assessed to the City of Chicago	No dollars.
	Total cost of the improvement	34,500 00

JOHN A. MAY,
Superintendent of Special Assessments of the City of Chicago.

Dated Chicago, March 26th, A. D. 1904.

25 *Certificate for Street Improvement Assessments, Etc.*

CHICAGO, *March 26th*, 1904.

The undersigned, appointed by the County Court of Cook County, to make a true and impartial assessment of the cost of curbing with a granite concrete combined curb and gutter, grading and paving with asphalt Drake Avenue from the north curb line of West Fullerton Avenue to the southwesterly curb line of Milwaukee Avenue in the City of Chicago, County of Cook, and State of Illinois, in accordance with the Ordinance recommended, and estimate of the Engineer of the Board of Local Improvements, submitted by the Board of Local Improvements, and passed and approved by the City Council of the City of Chicago on January 18th, A. D. 1904, recited in the petition of the City of Chicago, Docket No. 28,922 of said Court upon the City of Chicago and the property benefited thereby, hereby certifies that he has completed the foregoing assessment roll showing a list of all the lots, blocks, tracts and parcels of land assessed for the proposed improvement, the amounts assessed against each, the name of the person who paid the taxes on each such parcel during the last preceding calendar year in which the taxes were paid thereon, as ascertained by an investigation by me, the residence of the person so paying the taxes on each such parcel so far as the same can on diligent inquiry be found, the amount of each installment of such assessment, that he did estimate what proportion of the total cost of said improvement will be of benefit to the public, and what proportion thereof will be of benefit to the property to be benefited, and did apportion the same between the City of Chicago and such property so that each shall bear its relative equitable proportion.

The amount so estimated and apportioned to said City as public benefits being the sum of No Dollars, and the amount so estimated apportioned to property to be benefited being the sum of $34500.00, and having found said amounts, he did apportion and assess the amount so found to be of benefit to the property, upon the several lots, blocks, tracts and parcels of land, in the proportion in which they will be severally benefited by said improvement.

JOHN A. MAY,
Superintendent of Special Assessments of the City of Chicago.

26 28 Docket No. 28922.

STATE OF ILLINOIS, *County of Cook, ss.*

John A. May being first duly sworn on oath, says, that he was heretofore appointed and directed by the County Court of Cook County, to make a true and impartial assessment of the cost of the said improvement upon the City of Chicago, and the property benefited by such improvement; that he verily believes that the amounts assessed against the City of Chicago for public benefits and against each parcel of property assessed in the assessment roll by him made in pursuance thereof and attached hereto, are just and equitable, and do not exceed the benefit which will in each case be derived from said improvement, and that no lot, block, tract or parcel of land has been assessed in said assessment for said improvement more than its proportionate share of the cost of said improvement.

JOHN A. MAY,
Superintendent of Special Assessments of the City of Chicago.

Subscribed and sworn to before me this 26th day of March, A. D. 1904.

TIMOTHY SULLIVAN,
Notary Public.

[SEAL.]

* * * * * * *

29 35 And afterward, to-wit, on the 12th day of April, A. D. 1904, the following among other proceedings were had by and before said Court and entered of record, to-wit:

In the Matter of the Special Assessment of the City of Chicago.

28922.

On motion of the attorney for the said City of Chicago, It is ordered by the Court that any and all parties desiring to object to the confirmation of the assessment roll herein file their objections thereto in writing on or before Friday, April 15th, 1904, at ten o'clock A. M.

* * * * * * *

36 And afterwards, and on to-wit, the eleventh day of May, 1904, certain objections were filed in said cause in said court, which objections are in words and figures as follows, to-wit:

37 STATE OF ILLINOIS, *County of Cook, ss:*

In the County Court of Cook County, of the April Term, 1904.

In the Matter of the Special Assessment of The City of Chicago for Curbing, Grading, and Paving with Asphalt Drake Avenue from W. Fullerton Avenue to Milwaukee Avenue. No. 28922.

And now comes the owner of the real estate set forth in the Schedule of Lands hereto attached, by George W. Wilbur, his attorney, and objects to the confirmation of said assessment as to said lots and parcels of land, or either of them, for the reasons stated in the objections to judgment of confirmation hereto attached.

GEO. W. WILBUR,
Attorney for Objectors.

38 *Schedule of Lands.*

Subdivision of the N. W. ¼ of the N. W. ¼ of the S. E. ¼ of Section 26, Town. 40 North, Range 13 East.

		Lot.	Block.
Thomas H. Hulbert, W. ½		6	1
"		7	"
"		8	"
"		9	"
"		10	"
"		11	"
"		18	"
"		29	"
"		1	2
"		2	"
"		3	"
"		4	"
"		5	"
"	E. ½	6	"
"		30	"
"	S. 24 feet	31	"
"		38	"
"		39	"

39 *Objections to Judgment of Confirmation.*

* * * * * * *

4. The Board of Local Improvements did not adopt any preliminary resolution for the proposed improvement in the manner and form required by law; neither was such alleged resolution transcribed into the records of said board. Said resolution as to the time for a public hearing, and as to other material and jurisdictional

natters, is not in accordance with the act under which said proceedings were instituted.

5. Said alleged estimate of the cost of said improvement was not made by the proper officer, and is not in the form required by law; he officer making the same did not certify that said estimate does ot exceed the probable cost of said improvement, as required by aw; said estimate includes items not embraced in said ordinance; aid estimate is excessive and void.

* * * * * *

0 9. The ordinance prepared by the Board of Local Improvements did not describe the nature, character, locality and description of said proposed improvement; neither does it provide whether or not the same shall be made wholly or in part by special assessment or special taxation of contiguous property, or both.

10. The requirements of the act of the General Assembly of Illinois, entitled, "An Act Concerning Local Improvements," approved June 14th, 1897, and the various amendments thereof, preliminary o the passage of said alleged ordinance by the city council, have been wilfully and substantially disregarded by said Board of Local improvements, and the proceedings of said board prior to the passage of said alleged ordinance are illegal and void.

* * * * * *

13. Said city council never passed said ordinance in its legislative capacity, but it approved the same as a matter of form and under the direction and suggestion of said Board of Local Improve-
41 & 42 ments; that by reason thereof said ordinance is not the ordinance of said city council, passed freely and voluntarily, and after due deliberation.

* * * * * * *

15. The commissioner making said assessment was, at the time of the making of the same, and still is, in the employ of the petitioner herein, and said assessment roll, and the reports of said commissioners in regard thereto, are illegal and void because not made by an impartial and unprejudiced commissioner.

* * * * * * *

43 27. The ordinance, petition, recommendation, estimate, assessment roll, order appointing a commissioner to make said assessment roll, and all other documents and proceedings herein, are illegal and void because such documents and proceedings and each thereof, are in violation of the statute under which said proceedings are being carried on.

28. The law under which this proceedings is being carried on, as well as said ordinance and all proceedings herein, are illegal and void because such law and such ordinance and proceedings are in conflict with the Constitution of Illinois, for the reason that they seek to deprive said petitioner, the City of Chicago, of certain rights and duties conferred upon and required of said petitioner under and by virtue of the charter under which it was originated, and under which it now exists, and also because said law, ordinance and proceedings are in conflict with Section 18, Article 3 and Section 7,

Article 5 and other sections and articles of Chapter 4, of an Act relating to cities and villages.

* * * * * * *

31. The said act, in force July 14, 1897, and all amendments thereto, are illegal, unconstitutional and void, for the reason that said Act and said amendments thereto, are in conflict with the Constitution of the State of Illinois, and with Section 9, Article 9 thereof.

32. Said Act under which this proceedings is being carried on, and all amendments thereto, is and are unconstitutional and
44 void, for the following, among other reasons, to-wit:

A. Said Act, and the amendments thereto, are in conflict with the Constitution of the State of Illinois, and with Section 9, Article IX thereof.

B. It confers upon the Board of Local Improvements sole, exclusive and arbitrary power over all local improvements, to the exclusion of the only constituted corporate authorities of said city, namely, the common council.

C. It confers upon the Board of Local Improvements the power to delegate matters involving the exercise of discretion upon officers and employees of its own choosing, and upon the Engineer of such Board.

D. It seeks to deprive property owners and these objectors of the use and control of their property, and it authorizes the taking of such property in a manner prohibited by the Constitution of the State of Illinois.

E. It confers upon Mayors of cities having a population exceeding 100,000, the power to originate Boards of Local Improvements, and to select members thereof, which board have sole, exclusive and arbitrary control and power over the construction of all local improvements, with or without a petition from property owners affected thereby, and with or without any necessity for such improvements, and to the exclusion of the corporate authorities duly constituted as required by said Constitution.

33. By reason of the unconstitutionality of said Act the proceedings before the Board of Local Improvements, the ordinance passed thereunder, and all other Acts and proceedings therein are illegal, unconstitutional and void.

34. Said Board of Local Improvements has no power to originate, pass and direct the making of any special assessments whatever, and all acts of said Board herein are illegal, unconstitutional and void.

35. The Legislature of the State of Illinois had no power, under the Constitution of said State, to create said Board of Local Improvements, and to delegate to it Legislative powers.

36. The City Council of the City of Chicago has never adopted said Act creating the Board of Local Improvements in the manner and form required by law, for which reason the members of said Board of Local Improvements are acting without authority of and in violation of law.

45–47 37. Said Act concerning local improvements passed June 14, 1897, and all amendments thereto, are not only con-

trary to the Constitution of Illinois, but they are also contrary to the Constitution of the United States and to the Fourteenth amendment thereof.

38. Said Act concerning local improvements, said ordinance, which is the basis of the present proceedings, and all documents and orders relating thereto, are contrary to the Constitution of the United States, and to the Fourteenth amendment thereof, because such Act, ordinance, document and orders seek to deprive objector of property without due process of law.

39. Said ordinance and proceedings are in other respects illegal, unconstitutional and void.

40. The proceedings herein, and said Act, are contrary to the Constitution of the United States, and to the Fourteenth amendment thereof, because the petitioner herein, under and by virtue of said Act and of said proceedings, seeks to deprive these objectors of their property without due process of law. Said proceedings and said Act are also contrary to the Constitution of the United States, and to the Fourteenth amendment thereof, for the reasons set forth in the several foregoing objections.

Wherefore, and for divers other errors appearing in said record and proceedings, these objectors respectfully ask that the foregoing objections be sustained, and that the petitioner herein be dismissed.

* * * * * * *

48 And afterwards, to-wit, on the 18th day of May, A. D. 1904, the following among other proceedings were had by and before said Court and entered of record, to-wit:

In the Matter of the Special Assessment of the City of Chicago.

28,922.

Now comes the objector herein represented by George W. Wilbur, his attorney, and prays an appeal to the Supreme Court of the State of Illinois, which is allowed upon said objector filing herein, within 30 days from this date, his appeal bond in the penal sum of $250.00 with sureties thereon, to be approved by the Court. It is further ordered that bill of exceptions in said cause be filed herein within 30 days.

49 And afterwards, to-wit, on the 10th day of June, A. D. 1904, the following among other proceedings were had by and before said Court and entered of record as follows, to-wit:

In the Matter of the Special Assessment of the City of Chicago.

28,922.

Now on this day the Court having examined the appeal Bond of the objectors represented by Geo. W. Wilbur in said cause doth approve thereof, and it is ordered that the same be filed.

It is further ordered that Bill of Exceptions of the objectors herein represented by Geo. W. Wilbur in said cause, be and is hereby extended to Tuesday, June 28th, 1904.

50 And afterwards, and on, to-wit, the tenth day of June, 1904, a certain appeal bond was duly approved and filed in said cause in said court, which appeal bond is in words and figures as follows, to-wit:

51 *Appeal Bond.—Special Assessment—County Court of Cook County.*

Know all Men by these Presents, That we Thomas H. Hulbert, as principal, and George W. Wilbur, as surety, of the County of Cook and State of Illinois, are held and firmly bound unto the people of the State of Illinois, in the penal sum of Two Hundred and Fifty ($250.00) Dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly, severally and firmly, by these presents.

Witness our hands and seals, this 9th day of June, A. D. 1904.

The Condition of the above Obligation is such, That whereas, the City of Chicago did, on the Fourteenth day of May A. D. 1904, in the County Court of Cook County, in the State aforesaid, and of the May Term thereof, A. D. 1904, recover a judgment of confirmation against the following described real estate on the application of The City of Chicago, to-wit:

The W. ½ lot 6 and lots 7, 8, 9, 10, 11, 18, 29 block 1 and lots 1, 2, 3, 4, 5 E. ½ 6, 30, S. 24 feet 31, 38 and 39, all in Sub. of N. W. ¼ N. W. ¼ S. E. ¼ Sec. 26, T. 40, N. R. E. for paving Drake avenue from Fullerton avenue to Milwaukee avenue, and known as Docket No. 28,922, for the sum of Eighteen Hundred ninety-seven Dollars and forty Cents, from which said judgment of confirmation of the said County Court of Cook County, the said Thomas H. Hulbert has prayed for, and obtained an appeal to the Supreme Court of Illinois.

Now, Therefore, if the said Thomas H. Hulbert shall duly prosecute his said Appeal with effect, and moreover, pay the amount of the judgment, costs, interests, and damages rendered, and to be rendered against him in case the said judgment shall be affirmed in said Court, then the above obligation to be void, otherwise to remain in full force and virtue.

THOMAS H. HULBERT. [SEAL.]
GEO. W. WILBUR. [SEAL.]

Taken and approved by me this 10th day of June A. D. 1904.

W. H. HINEBAUGH, [SEAL.]
Acting County Judge.

[Endorsed:] 28,922. County Court of Cook County. Special Assessment Appeal Bond. *In re.*, Paving Drake Ave. from Fullerton Ave. to Milwaukee Ave. Filed June 10 1904. Peter B. Olsen, Clerk.

2 And afterwards, to-wit, on the 24th day of June, A. D. 1904, the following among other proceedings were had by nd before said Court and entered of record, to-wit:

n the Matter of the Special Assessment of the City of Chicago.

28922.

Now on this day, it is ordered by the Court that the time for ob- ectors represented by Geo. W. Wilbur to file their Bill of Excep- ions in said cause be and the same is hereby extended to July 15th, 904.

3 And afterwards, to-wit, on the 15th day of July, A. D. 1904, there was filed with the Clerk of said Court a certain 3ill of Exceptions in words and figures as follows, to-wit:

4 STATE OF ILLINOIS, *County of Cook*, ss:

In the County Court of Cook County, of the May Term, 1904.

In the Matter of the Special Assessment of the City of Chicago for Curbing, Grading, and Paving with Asphalt Drake Avenue from West Fullerton Avenue to Milwaukee Avenue. No. 28922.

Bill of Exceptions.

Be it remembered, that on the 13th day of May, 1904, being one of the days of the May Term, 1904, of said Court, before his Honor, Linus C. Ruth, acting judge of said County Court, in the absence of and at the request of Honorable Orrin N. Carter, sole presiding judge of said court, said cause came on for trial and disposition. Said cause was heard without the intervention of a jury, a trial by jury on the question of benefits having been expressly waived by the parties hereto.

Appearances.

For Petitioner, Robert Redfield, Esq.
For Objector, Thomas H. Hulbert, Geo. W. Wilbur, Esq.

The petitioner, to maintain the issues on the question of the legal objections, offered the following evidence:

Mr. REDFIELD: I offer on behalf of petitioner the *prima facie* case herein, consisting of the petition, assessment roll and notices.

Mr. WILBUR: I object to the introduction of the various 55–79 documents on the ground that said ordinance is illegal and void because the first resolution of the Board of Local improvements, and other proceedings before the Board of Local Improvements, are not in compliance with the statute. Said resolution does not contain an itemized estimate of the cost of the improve-

ment as made by the Engineer and as is required by the statute; also the resolution adhering to the first resolution is illegal and void because it does not meet the requirements of the statute.

The COURT: The objection will be overruled.

Mr. WILBUR: I take an exception to the ruling of the Court.

Said petition, assessment roll and notices were received in evidence, and are, respectively, in words and figures as follows, to-wit:

80 The foregoing was all of the evidence offered on behalf of the petitioner as to the legal objections.

The objector, to maintain the issues as to the legal objections, offered in evidence the various resolutions and proceedings before the Board of Local Improvements, which documents are, respectively, in words and figures as follows, to-wit:

81 OCTOBER 8, 1903.

Board of Local Improvements.

CHICAGO, THURSDAY, *October* 8, 1903.

Present: Messrs. Lynch, Ericson, Schilling and May.

Absent: Mr. Kiolbassa.

On motion, the minutes of the meetings of October 6th and 7th were approved as read. * * *

The order of council and petition for paving with asphalt Drake Avenue, from Fullerton Avenue to Diversey Avenue, and requesting that a repeal of the ordinance be prepared, repealing the ordinance for macadam pavement between these points, was presented, and on motion it was ordered that the macadam proceedings be abandoned and a new estimate ordered for paving with asphalt, in accordance with the majority petition accompanying the council order, and a majority protest was filed September 30, 1902, to the macadam pavement.

82 DECEMBER 31, 1903.

Board of Local Improvements.

CHICAGO, WEDNESDAY, *December* 30, 1903.

Present: Messrs. Lynch, Ericson, Schilling, Kiolbassa and May.

Absent: None.

On motion, the minutes of the meetings of December 24th and 28th were approved as read.

Estimates having been furnished by the Engineer, pursuant to previous orders of the Board of Local Improvements, the same were approved, and on motion of John A. May, secretary, the following resolutions were adopted, the time and place for the public hearing for the same being fixed for eleven o'clock, A. M., January 14th and 15th, A. D. 1904, in Room 203, City Hall, to-wit:

* * * * * * *

Be it resolved by the Board of Local Improvements of the City of Chicago that a local improvement be and the same is hereby

originated, to be made within the city of Chicago, State of Illinois, as follows, to-wit:

That the roadway of Drake Avenue, from the north curb line of West Fullerton Avenue to the southerly curb line of Milwaukee Avenue, and also the roadways of all intersecting streets and alleys extended from the curb line to the street line produced, on each side of said Drake Avenue, between said points (except the roadway intersection of West Diversey Avenue with Drake Avenue) be improved by constructing a granite concrete combined curb and gutter on cinders, grading and paving with asphalt on six inches of Portland cement concrete, swept with natural hydraulic cement; an
83 estimate of the cost of such improvement, as made by the engineer of the board, being as below set forth; and that Thursday, the 14th day of January, A. D. 1904, at eleven o'clock, A. M., in Room 203, City Hall, be fixed for the time and place for the public consideration thereof.

Estimate.

Granite concrete combined curb and gutter on cinders, 7,126 lineal feet @ 70c	$4,988.20
Paving with asphalt on six inches of Portland cement concrete swept with natural hydraulic cement, 11,349 square yards @ $2.50	28,372.50
Adjustment of sewers, catch-basins and manholes	1,139.30
Total	$34,500.00

There being no further business, the meeting stood adjourned.

JOHN A. MAY, *Secretary.*

84 JANUARY 14, 1904.

Board of Local Improvements.

Chicago.

Public Hearing Thursday, January 14, 1904.

Present: Messrs. Lynch, Ericson, Schilling, Kiolbassa and May.
Absent: None.

The meeting of the Board of Local Improvements was held in Room 203, City Hall, for the purpose of giving a public hearing to the property owners interested in sundry proposed improvements, as below set forth, pursuant to resolutions heretofore adopted by said Board and in accordance with notices which, by the evidence submitted, the board finds have been filed pursuant to statute; at which hearing, after due consideration, on motion of John A. May, secretary, the following resolutions were adopted, to-wit:

Proceedings.

Resolved, by the Board of Local Improvements of the City of Chicago, that the following local improvements be made and adhered to, pursuant to prior resolutions heretofore adopted for the same, to-wit:

Paving Asphalt Dickens Avenue Ballou Street North Hamlin Avenue. Paving G. T. Slag Macadam 48th Street Ellis Avenue Madison Avenue. Paving G. T. Macadam 38th Street Indiana Avenue Grand Boulevard. Paving Asphalt Drake Avenue West Fullerton Avenue Milwaukee Avenue. Paving Asphalt Monroe Avenue 60th Street 67th Street. Paving Asphalt West Blackhawk Street North Paulina Street Elston Avenue.

* * * * * * *

JOHN A. MAY, *Secretary.*

85–159 The foregoing was all of the evidence offered on behalf of the objector to sustain the issues as to the legal objections.

The COURT: The legal objections will be overruled.

Mr. WILBUR: I take an exception to the ruling of the court.

Mr. REDFIELD: I offer, on behalf of the petitioner, to sustain the issues on the question of benefits, the *prima facie* case herein, consisting of the petition, assessment roll and notices.

Mr. WILBUR: I object to the introduction if the various documents on the ground that said ordinance is illegal and void because the first resolution of the Board of Local Improvements in regard to the said assessment does not contain an itemized estimate of the cost of the improvement made by the Engineer in the manner and form required by the statute.

The COURT: The objection will be overruled.

Mr. WILBUR: I take an exception to the ruling of the court.

Said various documents were received in evidence, and are the same documents which are set forth herein on the hearing of the legal objections.

The foregoing was all of the evidence offered on behalf of petitioner on the issues raised by the objections relating to benefits.

* * * * * * *

160 The COURT: The evidence in this case, as in all cases of this kind, is extremely conflicting; but taking into consideration the character—the value of the lots, and the character of the territory, I have reached the conclusion that these lots are assessed more than they will be benefited. The direct frontage on this street is not assessed more than it is benefited. The assessment, I think, is proper. The indirect assessment might have been more, in my judgment, but the corner lots are benefited—assessed too much—$381.55 for a twenty-five foot lot. I have reached the conclusion that there ought to be a reduction on these corners of at least twenty per cent. of the assessment; in fact, I think it ought to be made an even

$300 a lot instead of $381.55. As to lot 1 in block 2 and lot 11 in block 1 the finding of the court is that the property is assessed more than it will be benefited and more than its proportionate share of the cost of the improvement, and it should be reduced from $381.55 to $300.00. That is the property represented by Mr. Wilbur, and those are the corner lots on which you get a reduction.

Mr. REDFIELD: If your Honor thinks best we will ask for a judgment of confirmation of the entire roll as found.

The COURT: Yes, as found.

Mr. WILBUR: I take an exception to the ruling of the court.

The foregoing was all of the evidence offered on behalf of either party on the trial of said cause.

161 & 162 Thereupon the court overruled said objections, and each thereof, except as to the modifications of said assessment as to certain lots, as above set forth, and entered its order confirming said assessment as to the property of said objector, as modified, to which ruling of the court said objector by his counsel, then and there duly excepted

Thereupon said objector moved for a new trial of said cause, which motion was denied by said court, and said objector, by his counsel, then and there duly excepted.

Thereupon said objector prayed for an appeal to the Supreme Court of Illinois, which appeal was allowed upon filing an appeal bond in the sum of Two Hundred and Fifty Dollars with a bill of exceptions within thirty days.

And, forasmuch, therefore, as the matters above set forth do not fully appear of record, the objector herein tenders this, his bill of exceptions, and prays that the same may be signed and sealed by the judge of this court, in the manner and form required by statute, which is done accordingly this 15th day of July, 1904.

LINUS C. RUTH, [SEAL.]
Acting Judge of the County Court of Cook Co., Illinois.

O. K.
R. R.
GEO. W. WILBUR.

* * * * * * *

163 STATE OF ILLINOIS, *County of Cook, ss:*

I, Peter B. Olsen, Clerk of the County Court of Cook County, in the State aforesaid, and keeper of the records and files thereof, do hereby certify that the foregoing is a true correct and complete Transcript of the record as to the property of the objectors represented by Geo. W. Wilbur their attorney, in the matter of the special assessment of the City of Chicago for curbing, grading and paving with asphalt, Drake Avenue from West Fullerton Avenue to Milwaukee Avenue, (except the Bill of Exceptions) the original Bill of Exceptions being by stipulation incorporated herein and made a part of this Transcript of the record.

Gen. No. 28922.

All of which appears from the records and files of my office.

In witness whereof, I have hereunto set my hand and affixed the Seal of said County Court, at my office, in the City of Chicago, in said County, this 26th day of August A. D. 1904.

[SEAL.] PETER B. OLSEN,
Clerk of the County Court.

164 In the Supreme Court of Illinois, of the October Term, 1904.

THOMAS H. HULBERT, Appellant,
vs.
THE CITY OF CHICAGO, Appellee.

Appeal from County Court, Cook County.

Assignment of Errors.

Now comes the above named appellant, by George W. Wilbur, his attorney, and says that in said record and proceedings there are manifest errors in this, that is to say:

1. Said county court erred in not sustaining the objections of appellant, and each thereof.

2. Said county court erred in overruling the objections of appellant, and each thereof.

3. Said county court erred in admitting improper evidence on behalf of appellee and over the objections of appellant.

4. Said county court erred in refusing to receive proper evidence offered on behalf of appellant.

5. Said county court had no jurisdiction to entertain said proceedings for the reason that the petition and the ordinance, which is the basis thereof, is not in accordance with the statute, and because said ordinance does not state the nature, character, locality and description of the proposed improvement.

6. Said county court had no jurisdiction to enter a judgment of confirmation in said proceedings for the reason that the board of local improvements did not adopt a preliminary resolution for the proposed improvement in the manner and form required by law, neither was such alleged resolution transcribed into the records of said board in the manner required by statute. Said
165 resolution as to the time for a public hearing, and other jurisdictional matters, is not in accordance with the act under which said proceedings were instituted.

7. The court had no jurisdiction to enter a judgment of confirmation herein for the reason that the alleged estimate of the cost of the improvement was not made by the proper officer, and it is not in the form required by law. The officer making the same did not certify that such estimate does not exceed the probable cost of the proposed improvement and the lawful expenses attending the same. Said estimate is in other respects contrary to the statute.

8. Said county court had no jurisdiction to enter a judgment of confirmation herein because the proceedings before said board

of local improvement appearing in the record herein are not in accordance with the statute.

9. The ordinance herein is void because it provides for the collection of interest on the first installment of said assessment.

10. The county court erred in not finding that the property of appellant was assessed more than its proportionate share of the cost of said improvement, and more than it will be benefited by reason of the construction of the proposed improvement.

11. The finding of the county court is contrary to the law and it is also contrary to the evidence.

And for divers other errors appearing in said record and proceedings appellant prays that said judgment of said county court as to his property be set aside and held for naught.

Respectfully submitted,

GEO. W. WILBUR,
Attorney for Appellant.

166 At a Supreme Court, Begun and held at Springfield on Tuesday, the Fourth day of October in the year of our Lord One Thousand Nine Hundred and Four, within and for the State of Illinois,

Present: James B. Ricks, Chief Justice; Benjamin D. Magruder, Justice; Jacob W. Wilkin, Justice; James H. Cartwright, Justice; Carroll C. Boggs, Justice; John P. Hand, Justice; Guy C. Scott, Justice; Howland J. Hamlin, Attorney General; Benjamin H. Brainerd, Sheriff.

Attest:

CHRISTOPHER MAMER, *Clerk.*

Be it remembered, to-wit, on the Twelfth day of October, A. D. 1904, the same being one of the days of the term of Court aforesaid, the following proceedings were by said Court had, and entered of record, to-wit:—

No. 3865.

THOMAS H. HULBERT
vs.
THE CITY OF CHICAGO.

Appeal County Court, Cook.

And now on this day comes the Appellee and moves the Court to extend the time for filing his briefs 10 days; which motion by the Court, is taken under advisement.

And afterwards, to-wit, on the 13th day of October, A. D. 1904, it being a day of term of Court aforesaid, the following proceedings were had and entered of record, to-wit:

And now on this day, the Court having duly considered the motion of Appellee to extend his time 10 days to file briefs, and the Court being fully advised in the premises overrules and denies said motion.

167 And afterwards, to-wit, on the 19th day of October, A. D. 1904, it being a day of term of Court aforesaid, the following proceedings were had and entered of record, to-wit:

And now on this day, come Appellee by counsel, and moves the Court for leave to file his briefs instanter, which motion is by the Court taken under advisement.

And afterwards, to-wit, on the 20th day of October, A. D. 1904, it being a day of term of Court aforesaid, the following proceedings were had and entered of record, to-wit:

And now on this day the Court having duly considered the motion of Appellee for leave to file his briefs instanter, and being fully advised in the premises allows said motion and orders said briefs filed.

168 No. 3865.

THOMAS H. HULBERT
vs.
THE CITY OF CHICAGO.

Appeal County Court, Cook.

Now on this day come the parties hereto and this being one of the days set apart for the call of the docket under the rules of this Court, and it appearing to the Court that appellant, hath filed herein a duly certified transcript of the record and proceedings of the Court below, together with printed abstracts thereof, and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said appellee having entered motion to affirm said judgment and for costs and *procedendo*, and said motions being taken under advisement for final hearing, and the Clerk of this Court reporting that said cause is now ready to be taken, and said cause is here submitted for the consideration and judgment of the Court:

Therefore it is ordered by the Court that this cause be and the same is hereby taken under advisement.

169 At a Supreme Court, Begun and held at Springfield on Tuesday, the Sixth day of December, in the year of our Lord One Thousand Nine Hundred and Four, within and for the State of Illinois.

Present: James B. Ricks, Chief Justice; Benjamin D. Magruder, Justice; Jacob W. Wilkin, Justice; James H. Cartwright, Justice; Carroll C. Boggs, Justice; John P. Hand, Justice; Guy C. Scott, Justice; Howland J. Hamlin, Attorney General; Benjamin H. Brainerd, Sheriff.

Attest: CHRISTOPHER MAMER, *Clerk*.

Be it remembered, to-wit, on the 22nd day of December, A. D. 1904, the same being one of the days of the term of Court aforesaid, the following proceedings were by said Court, had and entered of record, to-wit:

No. 3865.

THOMAS H. HULBERT

v.

——— ———.

Appeal County Court, Cook.

And now, on this day, this cause having been argued by counsel, and the Court having diligently examined and inspected, as well the record and proceedings aforesaid, as the matters and things therein assigned Error, and being now sufficiently advised of and concerning the premises, for that it appears to the Court now here, that neither in the record and proceedings aforesaid nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and that in that record there is no error: Therefore it is considered by the Court that the judgment aforesaid be Affirmed in all things, and stand in full Force and Effect, notwithstanding the said matters and things therein assigned for error, and it is further considered by the Court, that the said Appellee recover of and from the said Appellant costs by it in this behalf expended, and that it have execution therefor.

170 At a Supreme Court, Begun and held at Springfield on Tuesday, the Sixth day of December, in the year of our Lord One Thousand Nine Hundred and Four, within and for the State of Illinois.

Present: James B. Ricks, Chief Justice; Benjamin D. Magruder, Justice; Jacob W. Wilkin, Justice; James H. Cartwright, Justice; Carroll C. Boggs, Justice; John P. Hand, Justice; Guy C. Scott, Justice; Howland J. Hamlin, Attorney General; Benjamin H. Brainerd, Sheriff.

Attest: CHRISTOPHER MAMER, *Clerk.*

Be it remembered, That afterwards, to-wit, on the Twenty-Second day of December, 1904, the opinion of the Court was filed in the words and figures following to-wit:

No. 3865.

THOMAS H. HULBERT
v.
CITY OF CHICAGO.

Error to —. Appeal from County Court, Cook.

171 Docket No. 3865. Agenda 115. October, 1904.

THOMAS H. HULBERT
v.
CITY OF CHICAGO.

Mr. Justice HAND delivered the opinion of the court:

This is an appeal from a judgment of the county court of Cook county confirming an assessment to defray the cost of paving Drake avenue from Milwaukee avenue to West Fullerton avenue, in the city of Chicago.

It is first objected that the estimate of the cost of the improvement by the engineer is not sufficiently itemized. The estimate of the engineer, omitting the preamble and the engineer's certificate and signature, is as follows:

"Estimate.

Granite concrete combined curb and gutter on cinders, 7126 lineal feet at 70 cents	$4,988.20
Paving with asphalt on six inches of Portland cement concrete swept with natural hydraulic cement, 11,349 square yds. at $2.50	28,372.50
Adjustment of sewers, catch-basins and man-holes	1,139.30
Total	$34,500.00"

Section 7 of the Local Improvement act (Hurd's Stat. 1903, p. 392,) provides that when the board of local improvements shall originate a local improvement to be paid for by special assessment or special taxation, it shall adopt a resolution describing the proposed improvement, which resolution shall be at once transcribed into the records of the board, and shall fix a time and place for the public consideration thereof, which shall not be less than ten days after the adoption of said resolution, and "shall also cause an estimate of the cost of such improvement * * * to be made in writing by the engineer of the board * * * over his signature, which shall be itemized to the satisfaction of said board, and which shall be made a part of the record of such resolution," and a five days' notice, by mail, of the public hearing is required to be given to the person who paid the general taxes for the last preceding year on each lot, block, tract or parcel of land fronting on the proposed improvement.

In *Bickerdike v. City of Chicago*, 203 Ill. 636, and *Kilgallen v. City of Chicago*, 206 *id.* 557, the proceedings required by said section of the statute are held to be jurisdictional, and that a valid ordinance cannot be passed for a local improvement to be paid for by special assessment or special taxation without a compliance therewith; and in *City of Peoria v. Ohl*, 209 Ill. 52, that the engineer's esti-
172 mate must be itemized, and that the statement by the engineer of the cost of the sidewalk, to be built by special taxation, in gross, was not a compliance with the statute. It was, however, said in *Lanphere v. City of Chicago*, 000 Ill. 000, that a substantial compliance with the provisions of the statute is all that is required; and in *Gage v. City of Chicago*, 207 Ill. 56, that it is not necessary that the resolution describe the improvement with the same particularity as it is required to be described in the ordinance. We think the estimate of the engineer above set forth as itemized was sufficiently specific to give the property owner a general idea of what it was estimated the substantial component elements of the improvement would cost, and that it is in substan-ial compliance with the requirements of the statute.

It is next contended that the resolution of the board of local improvements adhering to the proposed improvement was insufficient, which resolution was in the following form:

"JANUARY 14, 1904.

"Board of Local Improvements.

" * * * A meeting of the board of local improvements was held in room 203 for the purpose of giving public hearing to the property owners interested in sundry proposed improvements, as above set forth, pursuant to resolution heretofore adopted by said board, and in accordance with notices which, on evidence submitted, the board finds have been mailed pursuant to statute, at which hearing for public consideration the following resolutions were adopted, to-wit:

"Proceeded with:

"*Resolved by the Board of Local Improvements of the City of Chicago*, That the following local improvements be made and adhered to pursuant to prior resolutions heretofore adopted for the same, to-wit: * * * Paving, asphalt, Drake avenue, from West Fullerton avenue to Milwaukee avenue." * * *

Section 8 of the Local Improvement act provides: "In case any person shall appear to object to the proposed improvement or any of the elements thereof, said board shall adopt a new resolution abandoning the said proposed scheme or adhering thereto, or changing, altering or modifying the extent, nature, kind, character and estimated cost." In this case the improvement was not abandoned, changed, altered or modified, but it was determined at the public hearing to construct the improvement in accordance with the original resolution, therefore all that was required of the board was to pass a

resolution adhering to the prior resolution. This was done,
173 and the resolution, we are of the opinion, as adopted by the board was sufficient. Had the board at the public hearing altered, changed or modified the extent, nature, kind, character or estimated cost of the improvement, such modification or alteration should have been described with reasonable certainty in a new resolution.

It is next contended that sections 42 and 86 of the Local Improvement act, in accordance with the terms of which, by the ordinance, the assessment was divided into installments and bonds to anticipate the payment of the deferred installments were provided for to be issued, is unconstitutional, on the ground that the legislature had no authority to fix the rate of interest which said installments and bonds should bear, at five per cent. No authority has been cited to sustain that position. It is, however, urged that the effect of said sections is to deprive the property owner of his property without due process of law, in this: that the rate of interest on the deferred installments and bonds cannot be fixed at a lower rate by the city than five per cent, and it is said that the city, if untrammeled by the statute, might be able to issue and negotiate the same at a lower rate than that fixed by the statute. We cannot agree with the view of appellant, but are of the opinion the legislature had the right to fix the rate of interest which said deferred installments and bonds, when issued, should bear, and that those sections of the statute are not in conflict with the constitution.

The question of benefits to the property of appellant was submited to the court, a jury having been waived, and it is urged the property of appellant is assessed too high and for an amount greater than it will be benefited by the improvement. The evidence upon that question was conflicting. The judge before whom the case was tried heard and saw the witnesses, and we are unable to point out wherein his finding of fact was wrong. The rule is, where the evidence was heard in open court and is conflicting, the judgment of the lower court will be affirmed unless it is manifest that error has been committed. *Topliff v. City of Chicago*, 196 Ill. 215.

Finding no reversible error in this record the judgment of the county court will be affirmed.

Judgment affirmed.

174 STATE OF ILLINOIS, *Supreme Court, ss:*

I, Christopher Mamer, Clerk of the Supreme Court of the State of Illinois, and keeper of the Records and seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Supreme Court in the above entitled cause of record in my office.

This copy is not to operate as a mandate in any event. Mandate will be issued only on request and payment of costs.

In testimony Whereof, I have set my hand and affixed the seal of the said Supreme Court at Springfield, this 24th day of April A. D. 1905.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

CHRISTOPHER MAMER,
Clerk of the Supreme Court.

175 At a Supreme Court, begun and held at Springfield on Tuesday, the Seventh day of February in the year of our Lord One Thousand Nine Hundred and Five, within and for the State of Illinois,

Present: James B. Ricks, Chief Justice, Benjamin D. Magruder, Justice, Jacob W. Wilkin, Justice, James H. Cartwright, Justice, Carroll C. Boggs, Justice, John P. Hand, Justice, Guy C. Scott, Justice, William H. Stead, Attorney General, Benjamin H. Brainerd, Sheriff.

Attest: CHRISTOPHER MAMER, *Clerk.*

Be it remembered, to-wit, on the Ninth day of February, A. D. 1905, the same being one of the days of the term of Court aforesaid, the following proceedings were by said Court, had and entered of record to-wit:

No. 3865.

THOMAS H. HULBERT
vs.
THE CITY OF CHICAGO.

Appeal County Court, Cook.

And now on this day, the Court having duly considered the petition for rehearing filed herein by Appellee, and the Court being now fully advised in the premises, overrules and denies said petition.

176 In the Supreme Court of Illinois, of the February Term, 1905.

THOMAS H. HULBERT, Appellant,
vs.
THE CITY OF CHICAGO, Appellee.

Appeal from County Court, Cook County.

Petition for Citation.

To the Honorable James B. Ricks, Chief Justice of the Supreme Court of Illinois:

Now comes Thomas H. Hulbert, by George W. Wilbur, his attorney, and shows to the Chief Justice of the Supreme Court of the State of Illinois that in the record and also in the rendition of the judgment in the above-entitled cause, lately pending in the Supreme Court of the State of Illinois, between Thomas H. Hulbert, appellant, and The City of Chicago, appellee, and in which final judgment was rendered against said Thomas H. Hulbert on the ninth day of February, 1905, it appears in the record now remaining in the Supreme Court of Illinois that certain rights and privileges were claimed under the Constitution of the United States by said

Thomas H. Hulbert, appellant, and that said Supreme Court of the State of Illinois erroneously decided against said rights and privileges of said Thomas H. Hulbert, appellant, which were specially set up and claimed under stid Constitution; and, further, that the validity of the authority exercised by said State of Illinois was drawn in question in said suit by said Thomas H. Hulbert, appellant, on the ground that said authority was repugnant to the Constitution of the United States, and the decision of said Supreme Court of Illinois was in favor of the validity of said authority so
177 exercised; from all of which said Thomas H. Hulbert, appellant, alleges that it appears in the said record and proceedings in said suit manifest error has ocurred, to the great damage of said Thomas H. Hulbert, appellant.

Wherefore, said Thomas H. Hulbert respectfully asks that there be granted unto him, under and pursuant to the acts of Congress in such case made and provided, a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Illinois; that said record and proceedings may be reviewed and the said error therein may be corrected and speedy justice done in the premises; that said writ of error may be made a supersedeas; that a citation may issue herein, pursuant to law, citing and admonishing the said The City of Chicago to be and appear at the Supreme Court of the United States, at Washington, according to the usual course and practice in such cases; that the bond herewith presented to the court may be duly approved, and that such other and further orders and proceedings may be had and entered herein as may be necessary fully to grant to said Thomas H. Hulbert the relief herein prayed for, according to the usual course and practice in such cases.

And your petitioner will ever pray, etc.

THOMAS H. HULBERT.

GEO. W. WILBUR,
Counsel for Petitioner.

Filed, Mar. 28, 1905.

C. MAMER,
Clerk of Supreme Court.

178 In the Supreme Court of Illinois, of the February Term, 1905.

THOMAS H. HULBERT, Appellant,
vs.
THE CITY OF CHICAGO, Appellee.

Appeal from County Court, Cook County.

Order.

Upon motion of George W. Wilbur, attorney for appellant, and upon filing a petition for writ of error and an assignment of errors,

it is ordered that a writ of error be and hereby is allowed to have reviewed in the Supreme Court of the United States the judgment heretofore entered herein, and that the amount of the bond be, and hereby is, fixed at five hundred dollars ($500.00).

JAMES B. RICKS,
Chief Justice of the Supreme Court of Illinois.

Taylorville, Illinois, March 28th, 1905.

Filed Mar. 28, 1905.

C. MAMER,
Clerk of Supreme Court.

179 Know all men by these presents, That we, Thomas H. Hulbert, as principal, and M. R. Drennen as surety, are held and firmly bound unto The City of Chicago in the sum of Five Hundred Dollars, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Witness our hands and seals this 24th day of March, A. D. 1905.

The condition of the above obligation is such that whereas, on the 22nd day of December, 1904, a judgment of affirmance was rendered by the Supreme Court of the State of Illinois, being of the December term, 1904, of said court, in a certain cause therein pending, entitled "Thomas H. Hulbert, appellant, *vs.* The City of Chicago, appellee," in which said proceedings said principal obligor was appellant from a judgment rendered by the County Court of Cook County, Illinois, in the nature of an order confirming a special assessment levied by said appellee upon lots and lands of said appellant, in and by which said judgment of said County Court and of said Supreme Court said principal obligor claims that rights asserted by him under the Constitution of the United States were denied him; that, after the rendition of said judgment of affirmance in said Supreme Court, and on, to wit, the 16th day of January, 1905, said principal obligor filed in said Supreme Court his certain petition for a rehearing of said cause, and that afterwards and on, to wit, 9th day of February, 1905, and of the February term, 1905, said Supreme Court denied said petition for rehearing of said cause, and thereby sustained said judgment of affirmance so entered on said 22nd day of December, 1904, as to the principal obligor herein; and

Whereas, said principal obligor has sued out a writ of error from the Supreme Court of the United States to review said judg-
180 ment of affirmance, and has prayed that the same be made a supersedeas;

Now, if the said principal obligor shall prosecute his said writ of error with effect, and if he fail to make his plea good shall answer all costs and damages, then this obligation to be void; otherwise to remain in full force and effect.

THOMAS H. HULBERT. [SEAL.]
M. R. DRENNEN. [SEAL.]

Approved March 28, 1905.

JAMES B. RICKS,
Chief Justice Sup. Ct. of Illinois.

STATE OF ILLINOIS, *County of Cook, ss:*

M. R. Drennen, being first duly sworn, on oath deposes and says that he has signed the foregoing bond as surety; that he is the owner of real estate in fee simple, situated in Lake county in said state, the title to which is of record in his name, of the value of upwards of Five Thousand Dollars, which said real estate is free from all liens and incumbrances; that he is worth, over and above all his just debts and obligations, upwards of the sum of Five Thousand Dollars; and further affiant saith not.

M. R. DRENNEN.

Subscribed and sworn to before me this 27th day of March, 1905.

J. E. OWEN,
Notary Public.

[SEAL.]

Filed Mar. 28, 1905.

C. MAMER,
Clerk of Supreme Court.

181 In the Supreme Court of the United States, to the October Term, 1905.

THOMAS H. HULBERT, Plaintiff in Error,
vs.
THE CITY OF CHICAGO, Defendant in Error.

Error to Supreme Court of Illinois.

Assignment of Errors.

And now on the first day of the October term of this Court, before the Justices of the Supreme Court of the United States, in the City of Washington, comes the said Thomas H. Hulbert, plaintiff in error, by George W. Wilbur, his attorney, and says that in the record and proceedings aforesaid there is manifest error, that is to say:

First. The Supreme Court of Illinois erred in affirming the judgment of confirmation rendered by the County Court of Cook County against the property of plaintiff in error.

Second. The Supreme Court erred in not reversing and setting aside the judgment of confirmation rendered against the property of plaintiff in error by said County Court of Cook County.

Third. The Supreme Court of Illinois erred in holding that the County Court of Cook County had jurisdiction to confirm the assessment appealed from as to the property of plaintiff in error.

Fourth. Said County Court erred in not sustaining the objections of plaintiff in error and each thereof.

Fifth. Said County Court erred in not holding that the ordinance, which is the basis of said proceedings is contrary to the constitution of the State of Illinois, and contrary to the Constitution of the

182 United States and the Fourteenth amendment thereof.

Sixth. Said Supreme Court erred in overruling the as-

signments of error of plaintiff in error and each thereof, and in not sustaining the same.

Seventh. Said County Court erred in not dismissing said proceedings on the ground that the statute under which such proceedings were instituted and carried on is in conflict with the Constitution of the United States and with the Fourteenth amendment thereof, as set forth in the objections interposed in said County Court on behalf of said plaintiff in error, and said Supreme Court erred in sustaining said County Court.

Eighth. Said judgment of said County Court and the order of affirmance of the Supreme Court of Illinois are each unconstitutional and void because each of said findings tends to deprive the plaintiff in error of his property without due process of law, and contrary to the provisions of the Constitution of the United States and of the Fourteenth amendment thereof.

Ninth. Said Supreme Court erred in sustaining the judgment in favor of said defendant in error and against the plaintiff in error, whereas, by the law of the land, the said judgment ought to have been given for the said plaintiff in error and against the defendant in error; and the plaintiff in error prays the judgment aforesaid may be reversed, annulled and held for nothing, and that he may be restored to all things which he has lost by occasion of said judgment of confirmation.

GEO. W. WILBUR,
Counsel for Plaintiff in Error.

Filed Mar. 28, 1905.

C. MAMER,
Clerk of Supreme Court.

183 In the Supreme Court of the United States, to the October Term, 1905.

THOMAS H. HULBERT, Plaintiff in Error,
vs.
THE CITY OF CHICAGO, Defendant in Error.

Error to Supreme Court of the State of Illinois.

Stipulation as to Portions of Record to be Printed.

It is hereby stipulated and agreed by and between counsel for the respective parties herein that the following portions of said record be printed by the Clerk of this Court, in accordance with the rules of this Court:

1. Writ of error from Supreme Court of the United States, and certificate thereto.

2. Citation from the Supreme Court of the State of Illinois, together with the acceptance of service thereof and the certificate thereto.

3. Certificate of the Clerk of the Supreme Court of the State of Illinois as to transcript of record.

4. Print pages 2 to 26, inclusive, and page 29.

5. Omit pages 30 to 35, inclusive.

6. Print pages 36 to 45, inclusive, omitting however, objections numbered 1, 2, 3, 6 and 7, page 39; omitting objections 8, 11 and 12, page 40; omitting objections 14, 16, 17 and 18, page 41; omitting objections 19, 20, 21, 22, 23, 24 and 25, page 42; omitting objections 29 and 30, page 43.

7. Omit pages 46 and 47.

8. Print pages 48 to 55, inclusive.

9. Omit pages 56 to 79, inclusive, for the reason that the
184 same matter appears in a previous portion of the record.

10. Print pages 80 to 85, inclusive, except the last three lines of page 85.

11. Omit pages 86 to 159, inclusive, for the reason that said pages contain the testimony of various witnesses on the question of private benefits.

12. Print pages 160 and 161.

13. Omit page 162.

14. Print pages 163 to 182, inclusive.

The Plaintiff in Error intends to rely on the following assignments of error:

Assignments numbered 1 to 9, inclusive, and appearing on pages 181 and 182 of record.

Respectfully submitted.

GEO. W. WILBUR,
Counsel for Plaintiff in Error.
JAMES HAMILTON LEWIS,
Counsel for Defendant in Error.

185 [Endorsed:] File No. 19736. Supreme Court U. S. October Term, 1905. Term No. 248. Thomas H. Hulbert, Plaintiff in Error, *vs.* The City of Chicago. Stipulation to omit parts of record in printing. Filed Sept. 27, 1905.

Endorsed on cover: File No. 19,736. Illinois Supreme Court. Term No. 248. Thomas H. Hulbert, Plaintiff in Error, *vs.* The City of Chicago. Filed April 29th, 1905. File No. 19,736.

FILE COPY.

No. 19,736.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1905.

No. 248.

THOMAS E. HULBERT, Plaintiff in Error,

vs.

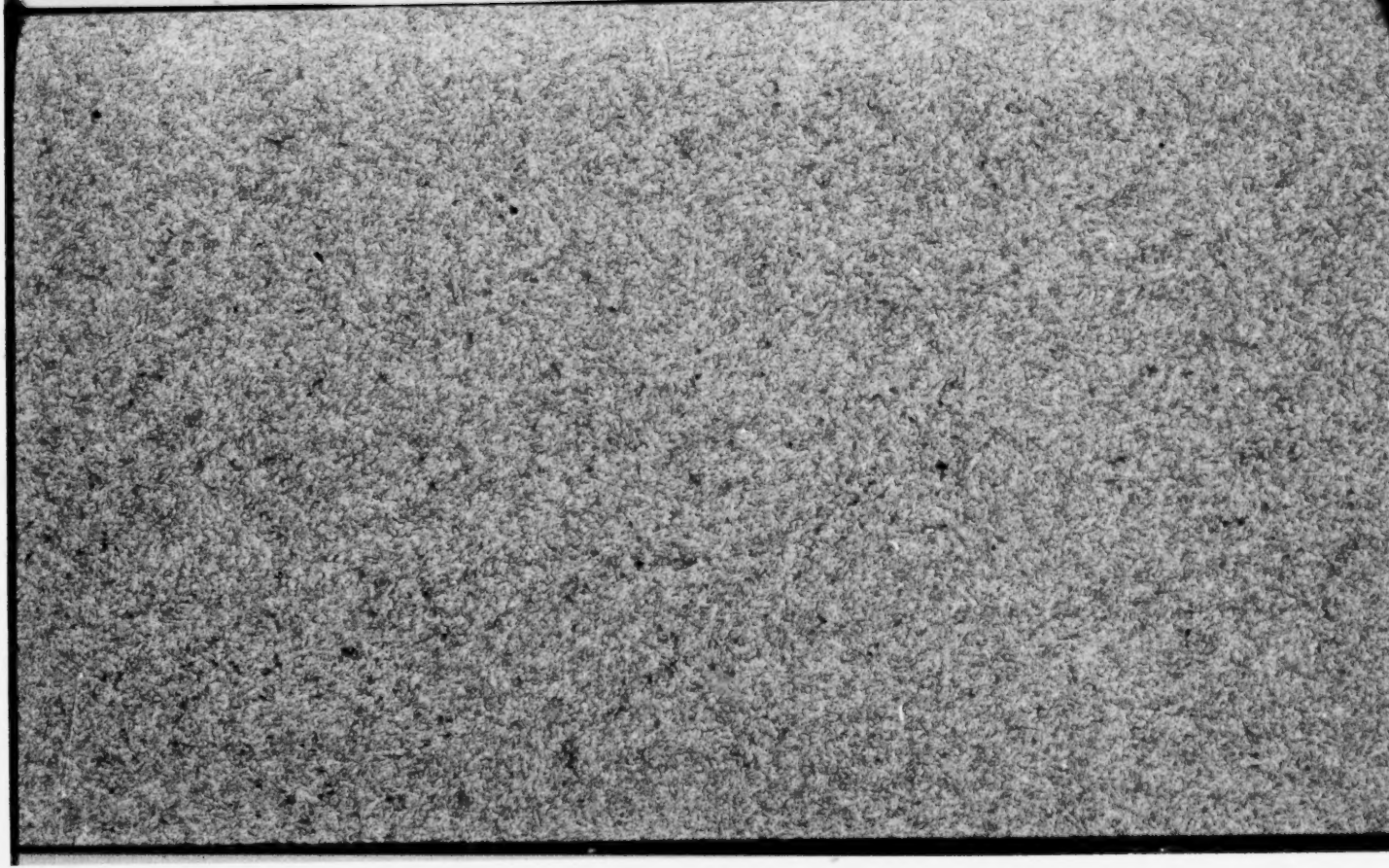
THE CITY OF CHICAGO, Defendant in Error.

Error to the Supreme Court of Illinois.

Brief on Behalf of Plaintiff in Error.

GEORGE W. WILBUR,

Attorney for Plaintiff in Error.



IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1905.

No. 248.

THOMAS H. HULBERT,
Plaintiff in Error,
vs.
THE CITY OF CHICAGO,
Defendant in Error.

Error to Supreme Court of Illinois.

Brief on Behalf of Plaintiff in Error.

I.

STATEMENT OF FACTS.

MAY IT PLEASE THE COURT:

In February, 1904, the defendant in error filed its petition in the County Court of Cook County, Illinois, praying that a special assessment be made in accordance with the terms of an ordinance passed by the City Council of Chicago, providing that Drake avenue, from Fullerton avenue to Milwaukee avenue, be paved with asphalt. Attached to the petition as a part thereof is a copy of the recommendation of the Board of Local Improvements, signed by the five members thereof; a copy of the estimate of

the engineer of the Board of Local Improvements, each being dated January 18, 1904, and a certified copy of the ordinance. The ordinance describes in detail the manner in which the proposed improvement is to be constructed. It also contains the following:

Said work to be done under the superintendence of the Board of Local Improvements of the said City of Chicago.

SECTION 2. That the recommendation of the Board of Local Improvements of the City of Chicago, providing for said improvement, together with the estimate of the cost thereof made by the engineer of said board, both hereto attached, be and the same are hereby approved.

SECTION 3. That said improvement shall be made and the whole cost thereof be paid for by special assessment in accordance with an act of the General Assembly of the State of Illinois, entitled "An Act Concerning Local Improvements," approved June 14, A. D. 1897, and amendments thereto.

SECTION 4. That the aggregate amount herein ordered to be assessed against the property, and also the assessment on each lot and parcel of land therein assessed, shall be divided into five installments in the manner provided by the statute in such cases made and provided, and each of said installments shall bear interest at the rate of five per centum per annum according to law until paid.

SECTION 5. And for the purpose of anticipating the collection of the installments of said assessments for said improvement, bonds shall be issued, payable out of said installments, bearing interest at the rate of five per centum per annum, payable annually, and signed by the mayor and by the president of the Board of Local Improvements, countersigned by the city comptroller, and attested by the city clerk under the corporate seal of the City of Chicago. Said bonds shall be issued in accordance with and shall in all respects conform to the provisions of the act of the General Assembly of the State of Illinois, en-

titled "An Act Concerning Local Improvements," approved June 14, A. D. 1897, and the amendments thereto.

SECTION 6. That the attorney of said board be and he is hereby directed to file a petition in the County Court of Cook County, Illinois, in the name of the City of Chicago, praying that steps may be taken to levy a special assessment for said improvement in accordance with the provisions of this ordinance, and in the manner prescribed by law. (Print. Rec., 4-10.)

John A. May, superintendent of special assessments was directed by the court to make the assessment, and on March 26, 1904, roll was certified by May and filed. (Print. Rec., 11-17.)

A rule was entered to file objections, whereupon plaintiff in error filed certain objections, together with a description of his property. After the filing of objections, a hearing was had, wherein the legal objections were overruled, and evidence was heard on the question of benefits. On this hearing the assessment was confirmed in all respects, except as to the assessment against one lot. An appeal was taken from the finding of the trial court to the Supreme Court of Illinois, where the judgment of the County Court was affirmed. A writ of error was thereupon sued out of this court to reverse such judgment of affirmance.

By stipulation all evidence in regard to benefits has been omitted from the printed record, so that the only question before this court relates to the validity and constitutionality of the "Act Concerning Local Improvements," under which the present proceedings were instituted.

The objections filed in the County Court and

which raise a constitutional and federal question, are the following:

28. The law under which this proceeding is being carried on, as well as said ordinance and all proceedings herein, are illegal and void because such law and such ordinance and proceedings are in conflict with the constitution of Illinois, for the reason that they seek to deprive said petitioner, the City of Chicago, of certain rights and duties conferred upon and required of said petitioner, under and by virtue of the charter under which it was originated, and under which it now exists, and also because said law, ordinance and proceeding are in conflict with Section 18, Article 3, and Section 7, Article 5, and other sections and articles of Chapter 4, of an act relating to cities and villages. (Print. Rec., 19.)

31. The said act, in force June 14, 1897, and all amendments thereto, are illegal, unconstitutional and void, for the reason that said act and said amendments thereto are in conflict with the constitution of the State of Illinois, and with Section 9, Article 9 thereof.

32. Said act under which this proceeding is being carried on, and all amendments thereto, is and are unconstitutional and void, for the following among other reasons, to wit:

A. Said act, and the amedments thereto, are in conflict with the constitution of the State of Illinois and with Section 9, Article 9 thereof.

B. It confers upon the Board of Local Improvements sole, exclusive and arbitrary power over all local improvements, to the exclusion of the only constituted corporate authorities of said city, namely, the Common Council.

D. It seeks to deprive property owners and these objectors of the use and control of their property, and it authorizes the taking of such property in the manner prohibited by the constitution of the State of Illinois.

E. It confers upon mayors of cities having a population exceeding 100,000 the power to originate boards of local improvements, and to select mem-

bers thereof, which boards have sole, exclusive and arbitrary control and power over the construction of all local improvements, with or without petition from property owners affected thereby, and with or without any necessity for such improvements, and to the exclusion of the corporate authorities duly constituted as required by said constitution.

33. By reason of the unconstitutionality of said act, the proceedings before the Board of Local Improvements, the ordinance passed thereunder, and all other acts and proceedings therein, are illegal, unconstitutional and void.

35. The Legislature of the State of Illinois had no power, under the constitution of said state, to create said Board of Local Improvements, and to delegate to it legislative powers.

37. Said act concerning local improvements, passed June 14, 1897, and all amendments thereto, are not only contrary to the constitution of Illinois, but they are also contrary to the constitution of the United States and to the 14th amendment thereof.

38. Said act concerning local improvements, said ordinance which is the basis of the present proceedings, and all documents and orders relating thereto, are contrary to the constitution of the United States, and to the 14th amendment thereof, because such act, ordinance, document and orders seek to deprive objector of property without due process of law.

40. The proceedings herein, and said act, are contrary to the constitution of the United States, and to the 14th amendment thereof, because the petitioner herein, under and by virtue of said act and of said proceedings, seeks to deprive these objectors of their property without due process of law. Said proceedings and said act are also contrary to the constitution of the United States, and to the 14th amendment thereof, for the reasons set forth in the several foregoing objections.

It is urged on behalf of plaintiff in error as ground for reversing the judgments of the trial and Supreme courts:

1. That the act concerning local improvements, approved June 14, 1897, and amendments thereto, is in conflict with the 14th amendment to the constitution of the United States, because it seeks to deprive him of his property without due process of law.

2. That said act is in conflict with Section 2, Article 2, and with Section 9, Article 9 of the constitution of Illinois.

3. Because the Board of Local Improvements, which originates all ordinances for local improvements, is composed of members not elected by the people to be taxed, nor appointed in any manner to which they have given their consent; that, under said act, the members of the board are not required to take any oath or to give bonds for the faithful performance of their duties; that said act, in effect, provides for a system of taxation for local improvements without representation on the part of the persons to be taxed.

4. Because said act deprives the Common Council of all right and authority to originate any ordinance for a local improvement, or to amend or repeal an ordinance recommended by the Board of Local Improvements. Said Common Council is the only corporate authority empowered to originate ordinances for local improvements under the constitution of Illinois.

5. Said act and the ordinance made in pursuance thereof are each unconstitutional and void, because they restrict the right of contract in that each fixes the maximum and minimum rate of interest in improvement bonds provided for therein, at the rate

of five per cent. per annum. By reason of this provision the defendant in error is prevented from issuing and offering improvement bonds at a less rate of interest than five per cent, to the injury of plaintiff in error.

II.

ERRORS RELIED UPON.

First. The Supreme Court of Illinois erred in affirming the judgment of confirmation rendered by the County Court of Cook County against the property of plaintiff in error.

Second. The Supreme Court erred in not reversing and setting aside the judgment of confirmation rendered against the property of plaintiff in error by said County Court of Cook County.

Third. The Supreme Court of Illinois erred in holding that the County Court of Cook County had judisdiction to confirm the assessment appealed from as to the property of plaintiff in error.

Fourth. Said County Court erred in not sustaining the objections of plaintiff in error and each thereof.

Fifth. Said County Court erred in not holding that the ordinance, which is the basis of said proceedings, is contrary to the constitution of the State of Illinois, and contrary to the constitution of the United States and the 14th amendment thereof.

Sixth. Said Supreme Court erred in overruling the assignments of error of plaintiff in error and each thereof, and in not sustaining the same.

Seventh. Said County Court erred in not dismissing said proceedings on the ground that the statute under which such proceedings were instituted and carried on is in conflict with the constitution of the United States and with the 14th amendment thereof, as set forth in the objections interposed in said County Court on behalf of said plaintiff in error, and said Supreme Court erred in sustaining said County Court.

Eighth. Said judgment of said County Court and the order of affirmance of the Supreme Court of Illinois are each unconstitutional and void because each of said findings tends to deprive the plaintiff in error of his property without due process of law, and contrary to the provisions of the constitution of the United States and of the 14th amendment thereof.

Ninth. Said Supreme Court erred in sustaining the judgment in favor of said defendant in error and against the plaintiff in error, whereas, by the law of the land, the said judgment ought to have been given for the said plaintiff in error and against the defendant in error; and the plaintiff in error prays the judgment aforesaid may be reversed, annulled and held for nothing, and that he may be restored to all things which he has lost by occasion of said judgment of confirmation.,

III.

CITATION OF CONSTITUTION AND STATUTES OF ILLINOIS REFERRED TO HEREIN.

The plaintiff in error relies upon the following portions of the constitution of Illinois, and of the statutes thereof, in relation to special assessments:

ARTICLE II OF CONSTITUTION.

§ 2. No person shall be deprived of life, liberty or property without due process of law.

ARTICLE IX OF CONSTITUTION.

§ 9. The general assembly may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment or by special taxation of contiguous property, or otherwise. For all other corporate purposes all municipal corporations may be vested with authority to assess and collect taxes; but such taxes shall be uniform in respect to persons and property, within the jurisdiction of the body imposing the same.

AN ACT Concerning Local Improvements. [Approved June 14, 1897. In force July 1, 1897.]

§ 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* POWERS CONFERRED.] That the corporate authorities of cities, villages and incorporated towns are hereby vested with the power to make such local improvements as are authorized by law, by special assessment, or by special taxation, of contiguous property, or by general taxation, or otherwise, as they shall by ordinance prescribe:

Provided, That this act shall apply only to such cities and villages as are now, or shall hereafter become, incorporated under an act entitled "An act to provide for the incorporation of cities and villages," approved April 10, 1872, in force July 1, 1872, and

to all cities, villages and incorporated towns which have heretofore adopted article 9 of the act above mentioned, in the manner therein provided, or shall hereafter adopt this act, as herein provided; but all other corporate authorities, having power to levy special assessments or special taxes for local improvements, may make use of the provisions of this act for that purpose in the manner hereinafter provided.

§ 2. MUNICIPAL OFFICERS IN CITIES OF 50,000 INHABITANTS AND OVER.] In cities of this state having a population of fifty thousand (50,000) or more, by the last preceding census of the United States, or of this state, there shall be appointed and designated, in the manner provided by law, or if no such method be provided, then by appointment of the mayor, a commissioner of public works, a superintendent of streets, a superintendent of special assessments, a superintendent of sewers and a city engineer. The compensation of such officers, if not fixed by law, shall be determined by the city council or board of trustees, and no order, resolution or ordinance to change the same shall be passed within one month after its introduction and publication. Such offices shall not be discontinued at any time, by ordinance or otherwise, but vacancies therein shall be filled in the same manner as the original appointment. The appointees to said offices shall be subject to removal by the mayor, but the term of office shall be held to expire as soon after the end of the term of the mayor appointing as their successors shall be appointed and qualified. [As amended by act approved and in force May 9, 1901.

ORDINANCE AUTHORIZING IMPROVEMENTS—PETITION OF PROPERTY OWNERS.] § 4. When any such city, town or village shall, by ordinance provide for the making of any local improvement, it shall, by the same ordinance, prescribe whether the same shall be made by special assessment or by special taxation of contiguous property or general taxation, or both. * * *

§ 5. RESTRICTION ON PASSAGE OF ORDINANCE.] No ordinance for any local improvements, to be paid

wholly or in part by special assessment or special taxation, shall be considered or passed by the city council or board of trustees of any such city, village or town, unless the same shall first be recommended by the board of local improvements provided for by this act.

§ 6. BOARD OF LOCAL IMPROVEMENTS.] In cities within the terms of this act, having a population of one hundred thousand (100,000) or more, by the last preceding census of the United States, or of this state, there is hereby created a board of local improvements, consisting of the superintendent of special assessments and four other members; such four members shall be nominated by the mayor and shall be confirmed by the city council or board of trustees of such city; and no one of which, except such superintendent of special assessments, shall be the head of any department of the government of such city, or hold any other office or position therein. Said board shall elect from its members a president, a vice-president and an assistant secretary. The superintendent of special assessments shall be ex-officio secretary of the board. In the absence or the inability of the president and the secretary to act, the vice-president for the president, and the assistant secretary for the secretary, are hereby given full power to sign and execute contracts, vouchers, bonds, pay-rolls and all other papers, documents, and instruments necessary to carry this act and all proceedings hereunder into full force and effect. Said board shall hold daily sessions for the transaction of all business in rooms accessible to the public to be provided by the city council.

The city council or board of trustees of such city shall provide for salaries for said board of local improvements. * * *

§ 7. PROCEEDINGS PRELIMINARY TO PUBLIC HEARING.] All ordinances for local improvement to be paid for wholly or in part by special assessment or special taxation shall originate with the board of local improvements. Petitions for any such public improvement shall be addressed to said board. Said board shall have the power to originate a scheme

for any local improvement, to be paid for by special assessment or special tax, either with or without a petition, and in either case shall adopt a resolution describing the proposed improvement, which resolution shall be at once transcribed into the records of the board.

Whenever the proposed improvement will require that private property be taken or damaged, such resolution shall describe the property proposed to be taken for that purpose. Said board shall, by the same resolution, fix a day and hour for the public consideration thereof, which shall not be less than ten days after the adoption of such resolution. Said board shall also cause an estimate of the cost of such improvement (omitting land to be acquired) to be made in writing by the engineer of the board (if there be one, if not, then by the president) over his signature, which shall be itemized to the satisfaction of said board, and which shall be made a part of the record of such resolution. Notice of the time and place of such public consideration or hearing shall be sent by mail directed to the person who paid the general taxes for the last preceding year on each lot, block, tract or parcel of land fronting on the proposed improvement, not less than five (5) days prior to the time set for such public hearing. Said notice shall contain the substance of the resolution adopted by the board and the estimate of the cost of the proposed improvement, and a notification that the extent, nature, kind, character and estimated cost of such proposed improvement may be changed by said board at the public consideration thereof and that if upon such hearing the board shall deem such improvement desirable, it shall adopt a resolution therefor and prepare and submit an ordinance therefor as hereinafter provided. * * *

§ 8. PUBLIC HEARING.] At the time and place fixed in said notice for the public hearing, the said board shall meet and hear the representations of any person desiring to be heard on the subject of the necessity for the proposed improvement, the nature thereof, or the cost as estimated. In case any per-

son shall appear to object to the proposed improvement or any of the elements thereof, said board shall adopt a new resolution abandoning the said proposed scheme or adhering thereto, or changing, altering or modifying the extent, nature, kind, character and estimated cost, provided such change shall not increase the estimated cost of the improvement to exceed twenty (20) per centum of the same without a further public hearing thereon, as it shall consider most desirable; and thereupon, if the said proposed improvement be not abandoned, the said board shall cause an ordinance to be prepared therefor, to be submitted to the council or board of trustees (as the case may be). Such ordinance shall prescribe the nature, character, locality and description of such improvement and shall provide whether the same shall be made wholly or in part by special assessment or special taxation of contiguous property; and, if in part only, shall so state.

If property is to be taken or damaged for said improvement, such ordinance shall describe the same with reasonable certainty. * * *

§ 9. RECOMMENDATION BY BOARD.] With any such ordinance, presented by such board to the city council or board of trustees, shall be presented also a recommendation of such improvement by the said board, signed by at least a majority of the members thereof. The recommendation by said board, shall be *prima facie* evidence that all the preliminary requirements of the law have been complied with, and if a variance be shown on the proceedings in the court, it shall not affect the validity of the proceeding, unless the court shall deem the same wilful or substantial.

§ 10. ESTIMATE OF COST.] Together with the said ordinance and recommendation shall be presented to the city council or board of trustees, an estimate of the cost of such improvement, as originally contemplated, or as changed, altered or modified at the public hearing, itemized so far as the board of local improvements shall think necessary, over the signature of the engineer of the board, if

there be one; if not, then the president of said board, who shall certify that, in his opinion, the said estimate does not exceed the probable cost of the improvement proposed, and the lawful expenses attending the same. The recommendation by said board shall be *prima facie* evidence presumed to be based upon a full compliance with the requirements of the act.

§ 36. SPECIAL ASSESSMENT.] When the ordinance under which a local improvement is ordered to be made, containing no provisions for the condemnation of private property therefor, shall provide that such improvement shall be wholly or in part paid for by special assessment, the proceedings for the making of such assessment shall be in accordance with the following provisions of this act.

§ 37. JURISDICTION OF COURTS.] Upon the passage of any ordinance for a local improvement pursuant thereto, it shall be the duty of the officer specified therein, to file a petition in some court of record in said county, in the name of such municipality, praying that steps [may] be taken to levy a special assessment for the said improvement, in accordance with the provisions of the said ordinance. The several Circuit and County Courts of this State, and the Superior Court of Cook county, shall have jurisdiction of any proceeding under this act. There shall be attached to or filed with such petition a copy of the said ordinance, certified by the clerk, under corporate seal; also a copy of the recommendation of the board of local improvements, and of the estimate of the cost, as approved by the legislative body. The failure to file any, or either of said copies shall not affect the jurisdiction of the court to proceed in said cause, and to act upon said petition, but if it shall appear in any such cause that such copies have not been attached to or filed with said petition before the filing of the assessment roll therein, then, upon motion of any objector for that purpose, on or before appearance day in said cause, the entire petition and proceeding shall be dismissed.

§ 38. (ORDER FOR ASSESSMENT.) Upon the filing of such petition, the superintendent of special assessments, in cities where such officer is provided for by law, otherwise some competent person appointed by the president of the board of local improvements, shall make a true and impartial assessment of the cost of the said improvement upon the petitioning municipality and the property benefited by such improvement.

§ 39. APPORTIONMENT OF COST.] It shall be the duty of such officer to estimate what proportion of the total cost of such improvement will be of benefit to the public, and what proportion thereof will be of benefit to the property to be benefited, and to apportion the same between the city, village or town and such property, so that each shall bear its relative equitable proportion; and having found such amounts, to apportion and assess the amount so found to be of benefit to the property, upon the several lots, blocks, tracts and parcels of land, in the proportion in which they will be severally benefited by such improvement: *Provided*, that no lot, block, tract or parcel of land shall be assessed a greater aomunt than it will be actually benefited; and when the proposed improvement is for the construction of a sewer, to investigate and report the district which will be benefited by such proposed sewer, describing the same by boundaries.

§ 41. ASSESSMENT ROLL—NOTICES.] The assessment roll shall contain a list of the lots, blocks, tracts and parcels of land assessed for the proposed improvement, the amount assessed against each, the name of the person who paid the taxes on each such parcel during the last preceding calendar year in which taxes were paid, as ascertained upon investigation by the officer making the return, or under his direction, the residence of the person so paying the taxes on each such parcel if the same can on diligent inquiry be found; in case of assessment in installments the amount of each installment shall also be stated; and the officer making such roll shall certify under oath that he verily believes that

the amounts assessed against the public and each parcel of property are just and equitable, and do not exceed the benefit which will in each case be derived from said improvement, and that no lot, block, tract or parcel of land has been assessed more than its proportionate share of the cost of said improvement. * * *

§ 42. (DIVISION OF ASSESSMENT INTO INSTALLMENTS —PAYMENT OF INTEREST.) It shall be lawful to provide by the ordinance for any local improvement, any portion of the cost of which is to be defrayed by special assessment or special taxation, or by ordinance passed at any time before the confirmation of the assessment roll, that the aggregate amount assessed, and each individual assessment, and also the assessment against the municipality on account of property owned by the municipality and for public benefits, be divided into installments, not more than ten (10) in number: *Provided, however,* that any such special assessment or special tax levy for building sewers, subways or viaducts may in like manner be divided into not exceeding twenty (20) installments. In all cases such division shall be made so that all installments shall be equal in amount, except that all fractional amounts shall be added to the first installment, so as to leave the remaining installments of the aggregate equal in amount and each a multiple of one hundred dollars ($100). * * *

All installments shall bear interest as hereinafter provided until paid, at the rate of five (5) per centum per annum. Interest on assessments shall begin to run from the date of the first voucher issued on account of work done as aforesaid. * * *

§ 86. BONDS TO ANTICIPATE INSTALLMENTS OF ASSESSMENT.] For the purpose of anticipating the collection of the second and succeeding installments, provided for in this act, it shall be lawful for such city, village or town, to issue bonds, payable out of said installments, bearing interest at the rate of five per centum per annum, payable annually and signed by such officers as may be by ordinance pre-

scribed; said bonds shall be issued in sums of one hundred dollars, or some multiple thereof, and shall be dated and draw interest from the date of the issuing of the same. Each bond shall state on its face out of which installment it is payable, and shall state, by number or other designation, the assessment to which such installment belongs. The principal of such bonds shall not exceed, in the aggregate, the amount of such deferred installments, and shall be divided into as many series as there are deferred installments: * * *

AN ACT to provide for reports to be made by the board of local improvements to the city council or board of trustees, and in reference to the repealing of ordinances for local improvements. [Approved and in force May 10, 1901.]

REPEAL OF ORDINANCE.] § 1. *Be it enacted by the People of the State of Illinois represented in the General Assembly:* No repeal of any ordinance ordering an improvement shall be made except on written recommendation of the board of local improvement (stating therein its reasons therefor).

IV.

BRIEF.

The act entitled, "An Act Concerning Local Improvements," passed June 14, 1897, and amendments thereto, is contrary to section 2, article 2, and section 9, article 9, of the constitution of Illinois.

The board of local improvements is not a municipal corporation, and it has no authority to make special assessments.

Harward v. *St. Clair & M. L. & D. Co.*, 51 Ill., 130.
Cornell v. *People*, 107 Ill., 372.
Updike v. *Wright*, 91 Ill., 49.
Gage v. *Graham*, 57 Ill., 144.
Dunham v. *People*, 96 Ill., 331.
Wetherell v. *Devine*, 116 *id.*, 631.
Snell v. *Chicago*, 133 *id.*, 413.
The People v. *Knopf*, 171 id., 191.

Sections 42 and 84 of said act are unconstitutional and void because they interfere with right of contract by fixing the rate of interest on assessments and improvement bonds at five per cent.

Ritchie v. *People*, 155 Ill., 98.
McChesney v. *People*, 200 *id.*, 146.
Adams v. *Brennan*, 177 Ill., 194.
Frorer v. *People*, 141 *id.*, 171.
Millett v. *People*, 117 *id.*, 294.
Bailey v. *People*, 190 *id.*, 28.

V.

ARGUMENT.

Plaintiff in error has brought the present proceedings to this court by writ of error to the Supreme Court of Illinois, upon the ground that an act entitled "An Act Concerning Local Improvements," passed by the legislature of Illinois June 14, 1897, and amendments thereto, being the act under which this proceeding was instituted, is unconstitutional and void; that such act and amendments are in conflict with the Fourteenth Amendment to the Constitution of the United States.

The plaintiff in error feels justified in claiming that the said act is clearly contrary to Section 9, Article 9 of the Constitution of Illinois and cited herein. There are many decisions of the Supreme Court of Illinois which seem to support this contention, while there is only one to the contrary, so far as I have been able to discover.

The portions of the act which are under consideration herein are set forth in full in a previous division hereof, so that a reference to the various sections may answer the present purpose.

The act provides for the creation of a board of local improvements, consisting of five members, one of whom shall be the superintendent of special assessments, while the other four members are to be nominated by the mayor and confirmed by the common council. This board, when formed in the man-

ner provided for, has sole and exclusive jurisdiction over all matters relating to special assessments and special taxation. As will be seen by the act, all ordinances for special assessments must originate with the board. While there is a provision for a petition by the property owners concerned in a local improvement, still, it is within the power of the board to originate such ordinance without a petition, and even in the face of the protest of a majority of the owners. The act also provides for an estimate of the cost of the improvement to be prepared by the engineer of the board. This estimate, together with the ordinance so prepared by the board, is then submitted to the common council with a recommendation of the board for the approval thereof. The common council, under the act, has only the right to approve or reject such ordinance. It will be seen by the act that all powers of discretion, so far as the common council is concerned, have been entirely taken away, and that it can do only one of two things, as stated above. It cannot amend such ordinance in any particular, and it cannot originate or propose any ordinance for a local improvement. Under a recent amendment to the act the common council is deprived even of the power to repeal an ordinance for a local improvement, except upon the written recommendation of the board of local improvements.

Section 9, Article 9, of the Constitution of Illinois, and cited above, is in part as follows:

> "The General Assembly may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment or by special taxation of contiguous property, or otherwise."

By this provision of the constitution, only the corporate authorities of cities can be vested by the legislature with power to make local improvements by special assessments or special taxation. The term "corporate authorities" and the powers and duties thereof, may be too well-known to require any explanation. Without citing authorities, it will probably be conceded and not disputed, that a municipal corporation is one having certain powers and duties of a legislative character; that these powers and duties are restricted within the terms of the constitution and the charter creating such corporation. Under the section of the Constitution of Illinois above referred to, the General Assembly is authorized to vest corporate authorities with power to make local improvements by special assessment or by special taxation. Under this section, however, the general assembly is not authorized to vest the mayors of certain cities with powers to nominate individuals, satisfactory to themselves, which individuals, when confirmed by the common council of the particular city, become at once a legislative body with sole and exclusive powers over all matters relating to special assessments and special taxation.

That the board of local improvements is not a municipal corporation, within the requirements of the Constitution of Illinois and the laws of said state, seems too plain for argument. The powers, however, which the legislature has sought by the act complained of to confer upon the board of local improvements, to be selected in the manner aforesaid, are extremely important and involve the highest rights in relation to real estate—rights which the

constitution and the laws have always endeavored to protect in the most careful manner; that such rights have not been so protected is the reason of the present appeal to this court.

It will be noticed that the act does not provide that it shall be submitted for adoption to the voters of the district to be affected thereby, so that there is nothing in the act itself which affords the property owner an opportunity to approve or disapprove of the provisions thereof. In other words, the plaintiff in error claims that the act provides for a system of taxation without representation, and for this reason it is not only contrary to the Constitution of Illinois and the section above referred to, but it is also contrary to the Constitution of the United States, because it is in conflict with the principle of taxation which has been in existence and has been maintained since the formation of the government.

The Constitution of Illinois particularly specifies the body which the legislature may vest with authority to make local improvements, yet the act complained of, without any change in the constitution, has entirely done away with such provision in as effective a manner as though it had never been adopted. And in lieu of such provision the legislature has sought to vest the board of local improvements with the same power in regard to local improvements as was previously vested in corporate authorities of cities. It may be claimed that the act does not wholly deprive the common council of its power in relation to special assessments because the ordinance which is prepared by the board

of local improvements is finally submitted to the common council for passage. While this is true, yet it is also true that the common council has no voice in the subject-matter of the ordinance or of any of the provisions thereof. The council is stripped of all power concerning the ordinance save, *pro forma*, to vote upon its approval or rejection. The mere clerical right to approve or reject amounts to nothing when the actual right to originate, alter or amend has been taken away. It is difficult to conceive of a municipal corporation which has only the power to approve or disapprove of ordinances previously and exclusively prepared by individuals outside of and in no way connected with such corporation.

The construction of local improvements in the City of Chicago is a matter of the greatest importance, and involves the annual expenditure of several millions of dollars. This vast sum is levied upon real estate in a summary manner, and its payment is exacted by the most direct means possible. For this reason it is extremely important to all property owners that the power to carry on such proceedings and to enforce such summary collection, should be vested in a body created in strict accord with the constitution. That the board of local improvements, as constituted under the act complained of, is not such a body is the contention of the plaintiff in error. He also feels justified in urging in this court that by reason of the provisions of the local improvement act, and the amendments thereof, he is being deprived of his property without due process of law and in a manner contrary to the

Constitution of the State of Illinois and contrary to many decisions of the highest court of that state. That legislation in regard to taxation should be enacted in an orderly and legal manner, and by individuals directly responsible to the people to be taxed, or appointed in some manner to which they have given their consent, will probably not be disputed. If this be the law, then the question to be determined by this court is whether or not the plaintiff in error, under the act complained of, is being deprived of his constitutional rights.

A perusal of the portions of the act set forth herein will show that it is arbitrary beyond all precedent. By it the property owners are deprived of all voice in regard to the character of an improvement, the necessity therefor, or the time of its construction; that it lies wholly within the power of the board of local improvements to say when, how and in what manner an improvement shall be made, and the law specially provides that the cost of the improvement, by way of assessment, shall be made by the superintendent of special assessments. That the law in this regard is impossible of performance may well be urged when we take into consideration the number of local improvements that are continually being made in the City of Chicago, the benefit of all of which improvements must be determined, as to each piece of property involved, by a single individual, and he must be so certain as to each particular assessment that he is willing to make his oath thereto, as he did in the proceedings now before this court.

The Supreme Court of Illinois, on a number of oc-

casions, has passed upon the question as to what is a corporate authority under the Constitution of Illinois, and also as to what authorities are authorized to levy special assessments or special taxes for local improvements. Some of the opinions of the latter court seem to have a direct bearing upon the contention of plaintiff in error herein, and for that reason citations of considerable length are given.

The case of *Harward* v. *St. Clair & Monroe L. & D. Co.*, 51 Ill., 130, which opinion was rendered in 1869, contains the following (135):

"The power of taxation is, of all the powers of government, the one most liable to abuse, even when exercised by the direct representatives of the people, and if committed to persons who may exercise it over others without reference to their consent, the certainty of its abuse would be simply a question of time. No person or class of persons can be safely entrusted with irresponsive power over the property of others, and such a power is essentially despotic in its nature, and violative of all just principles of government. It matters not that, as in the present instance, it is to be professedly exercised for public uses, by expending for the public benefit the tax collected. If it be a tax, as in the present instance, to which the persons who are to pay it have never given their consent, and imposed by persons acting under no responsibility of official position, and clothed with no authority of any kind by those whom they propose to tax, it is, to the extent of such tax, misgovernment of the same character which our forefathers thought just cause for revolution. We are of opinion that we do no violence to the language of the clause in the constitution we have been considering by holding that it was designed to prevent such ill-advised legislation as the delegation of the taxing power to any person or persons other than the 'corporate authorities' of the municipality or district to be taxed. These authorities are elected

by the people to be taxed, or appointed in some mode to which the people have given their assent, and to them alone can this power be safely delegated.

"This construction of the constitution is decisive against the validity of the tax under consideration, for it cannot be, and is not claimed, that this drainage incorporation, or the persons who compose it, are the corporate authorities in any sense of the district over which the act in question seeks to give them the power of taxation. As already said, the persons to be taxed have never given their assent to this act, and have had no voice in the selection of the members of this corporation. As the object of this constitutional clause was to prevent the legislature from granting the power of local taxation to persons over whom the population to be taxed could exercise no control, it is evident that, by the phrase 'corporate authorities,' must be understood those municipal officers who are either directly elected by such population or appointed in some mode to which they have given their assent. Another reason why the members of this drainage company cannot be considered corporate authorities is, that the constitution prohibits the legislature from appointing to office, and if these persons are corporate authorities, they have been appointed to that position by the legislature."

In *Updike* v. *Wright*, 81 Ill., 49, is the following (53):

"* * * It was also held, that power in the legislature was subject to the further limitation that a local burden of taxation or special assessments could not be imposed upon a locality without the consent of the taxpayers to be affected.

"That section of the constitution of 1870, upon this subject, provides 'the General Assembly may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessments, or by special taxation of contiguous property, or otherwise. For all other corporate purposes, all municipal corporations may be

vested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same.'

"The clause in the present constitution, like that in the constitution of 1848, must be construed as a limitation on the power of the legislature. Giving it that construction, the General Assembly can only vest cities, towns and villages with power to make local improvements by special assessments, or special taxation upon contiguous property benefited by such improvement. By necessary implication, it is inhibited from conferring that power upon other municipal corporations or upon private corporations. Only cities, towns and villages are within the constitutional provisions, and, although other municipal corporations may be vested with power to assess and collect taxes for corporate purposes, the limitation is absolute, such taxes shall be uniform in respect to persons and property within the jurisdiction imposing the same.

"With equal propriety, this clause of the present constitution, like the same provision in the former constitution, must be regarded as restricting the General Assembly in conferring the power to levy and collect taxes, either general or special, to the mode and manner therein indicated. We do not understand the legislature possesses plenary power, unlimited and unrestricted, to invest whomsoever it may choose with authority to assess and collect either special assessments or taxes for every conceivable purpose. As we have seen, only cities, towns and villages may levy special assessments or special taxation for local improvemnts, and all other municipalities can only be vested with jurisdiction to assess and collect taxes for corporate purposes, and that, too, under the positive inhibition such taxes shall be uniform in respect to persons and property. It would seem, therefore, to follow, as a corollary from the propositions stated, that neither the commissioners nor the juries selected, nor the County Court, is such a body as, under the constitution, may be given power to make local im

provements by special assessments or by special taxation upon contiguous property.

"There is still another consideration that has an important bearing on the decision of the case. The clause of the constitution we have been considering, like that in the constitution of 1848, must be understood, in the light of the decisions of this court, as forbidding the General Assembly from imposing a burden, by taxation, upon any locality, without the consent of the citizens affected."

In *Cornell* v. *People ex rel.*, 107 Ill., 372, is the following (379):

"The constitution of 1848, which was in force when the Act of 1869 was passed, provides: 'The corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes, such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same.' This clause of the constitution has been before the court for construction in a number of cases, and the decisions of this court are uniform to the effect that the clause is a limitation upon the power of the legislature to confer the right to assess and collect taxes upon any other persons than the corporate or local authorities of the municipality or district to be taxed. *Harward* v. *St. Clair and Monroe Levee and Drainage Co.*, 51 Ill., 130; *Updike* v. *Wright*, 81 *id.*, 49; *People* v. *Mayor*, 51 *id.*, 17; *People* v. *Morgan*, 90 *id.*, 558.

"The corporate authorities intended by the language of the constitution, upon whom the power of taxation was conferred, are such municipal officers as have been elected directly by the people of the district, or appointed in some mode to which the people of the district have given their assent. Upon this point, in the *Harward* case, it is said: 'These authorities are elected by the people to be taxed, or appointed in some mode to which the people have given their assent, and to them alone can this power be safely delegated.' In *The People* v. *Morgan*,

supra, in the discussion of the question, it is said: 'Under Section 10 of Article 9 of the constitution, the General Assembly is prohibited from imposing taxes on municipalities, and, under Section 9, can only vest the corporate authorities of such bodies with power to levy and collect taxes for corporate purposes.' Thus it is held that the people in such bodies must assent thereto by electing the authorities, or, by a vote for the charter, assent to their appointment by some other officer or person.

"Section 9 of Article 9 of the constitution of 1870, has received the same construction that was placed upon the constitution of 1848 on the same subject. (*Updike* v. *Wright*, 81 Ill., 49; *Dunham* v. *People*, 96 *id.*, 331.) In the last case cited, it is said: 'The clause in the constitution of 1870, adopted in the light of this construction, must be construed in the same manner as was construed the kindred clause in the constitution of 1848.'"

In *Gage* v. *Graham*, 57 Ill., 144, is the following (146):

But there is another objection in this case that is fatal to the tax. It is, that the law under which it is levied is repugnant to the constitution. In the case of *Harward* v. *The St. Clair & Monroe Levee & Drainage Co.*, 51 Ill., 130, it was held, that section 5 of article 9 of the constitution of 1848, was a limitation upon the power of the legislature to delegate the right of corporate or local taxation to any other than the corporate local authorities, and by the phrase "corporate authorities," must be understood those municipal officers who are either directly elected by the people to be taxed, or appointed in some mode to which they had given their assent. And the same construction was adopted and applied in *The People* v. *The Mayor, etc., of Chicago*, 51 Ill., 17; and again, in *The People* v. *Canty*, 55 Ill., 33.

The first section of the law under which this tax was levied creates persons therein named a body corporate. The second section authorizes the corporation to survey, locate, complete and alter ditch-

es, embankments, culverts, bridges and roads, and to maintain and keep them in repair, on the lands in certain townships, in one of which the lands in controversy are situated. * * *

It will be perceived that these officers are not elected, or appointed with the assent of a municipal corporation, nor with the assent of the persons to be taxed or assessed. They are appointed by the legislature and organized into a private corporation. They are clothed with large, if not dangerous, powers, are accountable to no person for their acts, and their doings are not subject to revision by any other body. Their power to make the assessment is absolute, and is limited by no rule but their discretion. * * * If such private corporations may be organized with such absolute power over the property of others, and they can be sustained, then the guarantees for our property are slender and precarious to an extent that but few had supposed. The very object of all government is security to life, liberty and property. If such burdens may be imposed without any rule but the pleasure or whim of three men, and these enforced under our laws, the tenure by which the citizen holds his property is slender indeed.

This law is violative of the 5th section of article 9 of the constitution, and hence the assessment cannot be sustained. * * *

The foregoing authorities, from the standpoint of plaintiff in error, seem to have a direct application as to the constitutionality of the act complained of, and as to the power of the Board of Local Improvement. The principle laid down in the above citations has been followed in other opinions rendered by the Supreme Court of Illinois, among which are:

Wetherell v. *Devine*, 116 Ill., 631 (635).

Snell v. *Chicago*, 133 Ill., 413 (440).

The People v. *Knopf*, 171 Ill., 191 (199-200).

The plaintiff in error feels justified in claiming that the finding against him in this proceeding is contrary to "the law of the land," and in violation of the 14th amendment to the Constitution of the United States.

VI.

SAID ACT IS UNCONSTITUTIONAL BECAUSE IT INTERFERES WITH THE RIGHT OF CONTRACT.

Plaintiff in error insists that certain sections of the act fixing the rate of interest on the judgment of confirmation and on the improvement bonds are illegal, unconstitutional and void.

Section 4 of the ordinance (Print. Rec., page 10) provides for a division of the assessment "into five installments in the manner provided by the statute in such cases made and provided, and each of said installments shall bear interest at the rate of five per centum per annum, according to law, until paid."

Section 42 of the act contains the following:

"* * * The first installment shall be due and payable on the second day of January next after the date of the first voucher issued on account of work done, and the second installment one (1) year thereafter, and so on annually until all installments are paid. * * * All installments shall bear interest, as hereinafter provided until paid, at the rate of five (5) per centum per annum. Interest on assessments shall begin to run from the date of the first voucher issued on account of work done as aforesaid."

Plaintiff in error contends that this provision of the statute is unconstitutional and void because it fixes a minimum and maximum rate of interest at the same amount. It is well known in commercial circles that municipal bonds draw interest in some instances at as low a rate as three per cent. However, the City of Chicago, under the foregoing statute, is prevented from taking advantage of the low rate of interest which often prevails in Chicago and in other cities.

Section 86 of said act, which is in line with Section 42 above referred to, contains the following:

"For the purpose of anticipating the collection of the second and succeeding installments, provided for in this act, it shall be lawful for such city, village or town to issue bonds, payable out of said installments, bearing interest at the rate of five per centum per annum, payable annually and signed by such officers as may be by ordinance prescribed."

This section does not provide for the issuance of improvement bonds for the first installment, while Section 5 of the ordinance states (Print. Rec., page 10):

"And for the purpose of anticipating the collection of the installments of said assessments for said improvement bonds shall be issued, payable out of said installments, bearing interest at the rate of five per centum per annum, payable annually, and signed by the Mayor and by the President of the Board of Local Improvements, countersigned by the City Comptroller, and attested by the City Clerk under the corporate seal of the City of Chicago. * * *"

It is apparent that outside of the constitutionality of Sections 42 and 86, and the ordinance for the

present proceedings, there is a conflict, not only between Sections 42 and 86, as to the installments which shall draw interest, but the ordinance is in conflict with Section 86 in not excepting the first installment in the issuance of improvement bonds.

Plaintiff in error claims that the latter section of the act is in conflict with Section 2 of Article 2 of the constitution of Illinois, which provides that "no person shall be deprived of life, liberty or property without due process of law."

In *Ritchie* v. *People,* 155 Ill., 98, wherein the above provision of the constitution was under consideration, it is stated (104):

"A number of cases have arisen within recent years in which the courts have had occasion to consider this provision, or one similar to it, and its meaning has been quite clearly defined. The privilege of contracting is both a liberty and a property right. * * * Liberty includes the right to acquire property, and that means and includes the right to make and enforce contracts. * * * The right to use, buy and sell property, and contract in respect thereto, is protected by the constitution. * * * In this country the legislature has no power to prevent persons who are *sui juris* from making their own contracts, nor can it interfere with the freedom of contract between the workman and the employer. The right to labor or employ labor, and make contracts in respect thereto upon such terms as may be agreed upon between the parties, is included in the constitutional guarantee above quoted. * * * The protection of property is one of the objects for which free governments are instituted among men. * * * And when an owner is deprived of one of the attributes of property, like the right to make contracts, he is deprived of his property within the meaning of the constitution."

(105): "This right to contract, which is thus included in the fundamental rights of liberty and property, cannot be taken away 'without due process of law.' The words 'due process of law' have been held to be synonymous with the words 'law of the land.'"

In *McChesney* v. *People*, 200 Ill., 146, where the question of the eight hour and alien labor clauses in contracts for the construction of public improvements were under consideration, the court holds (149):

"The contract is to be awarded to the responsible bidder offering to do the work for the lowest sum, and any provision tending to increase the cost and make the bids less favorable to the public and property owners is against public policy, illegal and void. The provision in the specifications limiting the right of the contractor and laborer to agree with each other upon the length of time which shall constitute a day's labor, and authorizing a forfeiture of the contract if the contractor should allow laborers to work more than eight hours in any one day, was pronounced illegal, unconstitutional and void in *Fiske* v. *People*, 188 Ill., 206, as infringing upon the freedom of contract to which every citizen is entitled under the law."

The holding above seems to be parallel to and in support of the contention of plaintiff in error in regard to the question of interest. It further appears from the authorities cited that any agreement made by the board, and which is to the disadvantage of the property owners, is illegal and void.

In *Adams* v. *Brennan*, 177 Ill., 194, it is stated (201):

"* * * Nor can the fact, if it be a fact, that an individual might make such a bargain authorize

these public officers exercising a public trust to do so. The individual may, if he chooses, give away his money, but the public officer, acting as a trustee, has no such liberty, and no right to surrender to a committee or any one else the rights of those for whom he acts."

The section of the act attempts to take from the Board of Local Improvements, which is a trustee of the property owner, the right to fix the lowest rate of interest possible upon improvement bonds. The property owners have a right to the best contract to be obtained, which involves the amount of such contract and the rate of interest upon deferred payments, if any. Can the legislature restrict the trustee of the property owners in a manner it could not, in the first instance, restrict the property owners themselves? There seems to be only one answer to this question, and that is in the negative.

In *Frorer* v. *People*, 141 Ill., 171, it is held (181):

"The privilege of contracting is both a liberty and a property right, and if A is denied the right to contract and acquire property in a manner in which he has hitherto enjoyed under the law, and which B, C and D are still allowed by the law to enjoy, it is clear that he is deprived of both liberty and property to the extent that he is thus denied the right to contract. Our constitution guarantees that no person shall be deprived of life, liberty or property without due process of law. * * * 'Due process of law' does not mean a statute passed for the purpose of working the wrong. * * * These words are held to be synonymous with the words 'law of the land.' * * * 'And this means general public law, binding upon all of the members of the community under all circumstances, and not partial or private laws, affecting the rights of private individuals or classes of individuals.'"

In *Millett* v. *People,* 117 Ill., 294, it is held (302):

"The rights of every individual must stand or fall by the same rule or *law* that governs every other member of the body politic, or land, under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. * * *"

In *Bailey* v. *People,* 790 Ill., 28, it is stated (34):

* * * An enactment which deprives one class of persons of the right to acquire and enjoy property, or to contract with relation thereto, in the same manner as others under like conditions and circumstances are permitted to acquire and enjoy property or contract with relation to it, is not comprehended within the true meaning of the words "due process of law," and is prohibited by the provisions of section 22 of article 4 of the constitution of 1870. * * *"

If the legislature were to pass a law fixing the rate of interest upon promissory notes, contracts or any other private obligations at the rate of five per cent. only, such act would undoubtedly be held to be unconstitutional. This illustration, it seems to me, is strictly in point, and applies to the question of interest as here presented.

In a special assessment proceedings the board of local improvements acts as trustee for the property owners, and it must exercise the utmost good faith in performing its duties. It is insisted that the legislature is without power to restrict the right to contact on behalf of the board, acting as such trustee for property owners, to any greater extent than it can restrict the right of contract on the part of a private individual. The law specifically

provides how assessments for improvements shall be made, and power is given to create a lien upon the property affected by the improvement, which lien can be enforced by sale. The law also permits private individuals to construct improvements, under the inspection of the board, at their own expense, and upon such terms as they are able to make. If the legislature attempted to interfere with this right of contract on behalf of property owners, such act would undoubtedly be declared unconstitutional; that is, if the legislature were to pass a law holding that deferred payments on private contracts for street improvements should bear interest at the rate of five per cent. per annum, and no more and no less, such act would be in conflict with section 2 of article 2, above referred to. Can the law affecting the trustee be less liberal than the law governing the principal?

Plaintiff in error feels justified in asserting that the right of contract is involved in the ordinance and in the provisions of the statute under consideration, and that he is deprived of the rights afforded him under the constitution. The question of the amount of interest is as important, in principle, as is the amount of the assessment or the amount of the contract price. If the board of local improvements must pay five per cent. on bonds when money can be procured for a less rate, then the constitution is violated, both in the ordinance and in the sections of the statute referred to.

The principles of law cited above in regard to the right of contract are of such general application, that it does not seem necessary to cite au-

thorities outside of the decisions of the Supreme Court of Illinois. Plaintiff in error, therefore, asks this court to hold that section 86 of said act is unconstitutional and void, and that under it he is deprived of certain rights guaranteed to him by the 14th amendment to the Constitution of the United States.

The plaintiff in error respectfully asks this Honorable Court to set aside the judgment of the Supreme Court of Illinois.

Respectfully submitted,

GEO. W. WILBUR,
Counsel for Plaintiff in Error.

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No. 19,736.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1905.

No. 243.

THOMAS H. HULBERT,
Plaintiff in Error,
vs.
THE CITY OF CHICAGO,
Defendant in Error.

Error to Supreme Court of Illinois.

Reply Brief on Behalf of Plaintiff in Error.

GEORGE W. WILBUR,
ATTORNEY FOR PLAINTIFF IN ERROR.

HOWARD & HELLER PRINT., CHICAGO.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1905

No. 248.

THOMAS H. HULBERT,
Plaintiff in Error,
vs.
THE CITY OF CHICAGO,
Defendant in Error.
} Error to Supreme Court of Illinois.

Reply Brief on Behalf of Plaintiff in Error.

MAY IT PLEASE THE COURT:

The main points insisted upon by counsel for defendant in error are:

1. That the constitutionality of the Local Improvement Act of June 14, 1897, was not passed upon in the opinion of the Supreme Court of Illinois, and that the record does not show it was called to the attention of that court.

2. That no federal question is involved in the record.

3. That the constitutionality of the Act of 1897 has been sustained by the Supreme Court of Illinois.

4. That Sections 42 and 86 of said act, fixing the rate of interest, involves a local and not a federal

question, and that the Supreme Court of Illinois has held such sections constitutional and valid.

I.

AS TO THE QUESTION OF JURISDICTION.

Counsel for defendant in error claim that no federal question appears in the record herein other than in the objections filed in the trial court, and that the assignments of error are insufficient.

The objections filed in the trial court appear on pages 18 to 21 of printed record, and those involving a federal question are set out on pages 4 and 5 of brief of plaintiff in error. These objections clearly show that a federal question was before the trial and Supreme courts. The assignment of errors in the Supreme Court include all matters set forth in the objections, while the assignment of errors in this court show that a federal question was raised in the Supreme Court of Illinois. Further than this, the writ of error, appearing on page 1 of printed record, states that a question involving a clause of the Constitution of the United States was before the Supreme Court of Illinois, and that such question was decided against the plaintiff in error. The writ bears the endorsement of James B. Ricks, Chief Justice of the Supreme Court of Illinois. The petition for citation, appearing on pages 35 and 36 of printed record also states that "certain rights and privileges were claimed under the Constitution of the United States by said Thomas H. Hulbert, appellant, and that said Supreme Court of the State

of Illinois erroneously decided against said rights and privileges of said Thomas H. Hulbert, appellant, which were specially set up and claimed under said Constitution; and, further, that the validity of the authority exercised by said State of Illinois was drawn in question in said suit by said Thomas H. Hulbert, appellant, on the ground that said authority was repugnant to the Constitution of the United States, and the decision of said Supreme Court of Illinois was in favor of the validity of said authority so exercised; from all of which said Thomas H. Hulbert, appellant, alleges that it appears in the said record and proceedings in said suit manifest error has occurred, to the great damage of said Thomas H. Hulbert, appellant."

The bond herein, which was approved by the Chief Justice of the Supreme Court of Illinois, sets forth claims similar to those appearing in the writ and in the petition. From this record it seems that no doubt should exist as to whether or not a federal question was before the Supreme Court of Illinois, which question was determined against the contention of the plaintiff in error.

While the opinion of the Supreme Court of Illinois makes reference only to Sections 42 and 86 of the Local Improvement Act, and holds that said sections are not unconstitutional, and that they do not "deprive the property owner of his property without due process of law," yet, such finding is not conclusive that no other federal question was before such court for consideraiton. The fact that no reference is made in the opinion to other federal questions seems, from authorities following, to be wholly immaterial.

The certification by the Chief Justice of the Supreme Court of Illinois ought to be conclusive as to all matters which were in fact before such court for determination. From this record, therefore, plaintiff in error insists that certain federal questions were before the Supreme Court of Illinois for determination; that such court found against the claims of plaintiff in error, and that this court has jurisdiction to determine, upon the merits, the validity of the finding of such Supreme Court.

Counsel for defendant in error have cited several authorities which they claim hold that this court, under the record herein, is without jurisdiction. Plaintiff in error, however, feels justified in insisting that, under numerous decisions, this court has full and complete jurisdiction to determine the questions involved herein upon the merits.

The authorities cited below seem to hold that the question of jurisdiction is to be found by an inspection of the record, and if such inspection shows that a federal question must, of necessity, have been before the Appellate Court for determination, although no reference is made to such question in the finding of the Appellate Court, then a federal question is involved, and this court has jurisdiction.

To sustain this proposition the attention of the court is called to *Murray* v. *City Council of Charleston*, 96 U. S., 432 (440):

"* * * The validity of the authority given by the State, as well as the validity of the ordinances themselves, was necessarily before the Court of Common Pleas when this case was tried; and no judgment could have been given for the defendant without determining that the ordinances were laws

of the State, not impairing the obligation of the contracts made by the city with the plaintiff. And when the case was removed into the Supreme Court of the State, that court understood a federal question to be before it. One of the grounds of the notice of the appeal was, 'That such a tax is a violation of good faith in the contract of loans, impairs the obligation of said contract and is, therefore, unconstitutional and void.' It is plain, therefore, that both in the Common Pleas and in the Supreme Court of the State, a federal question was presented by the pleadings, and was decided—decided in favor of the state legislation, and against the right the plaintiff claimed he has under the Constitution of the United States. The city ordinances were in question on the ground of their repugnancy to the inhibition upon the States to make any law impairing the obligation of contracts; and the decision was in favor of their validity. Nothing else was presented for decision, unless it be the question whether the acts of the State legislature authorized the ordinances; and that was ruled affirmatively. The jurisdiction of this court over the judgments of the highest courts of the States is not to be avoided by the mere absence of express reference to some provision of the Federal Constitution. Wherever rights acknowledged and protected by that instrument are denied or invaded, under the shield of State legislation, this court is authorized to interfere. The form and mode in which the federal question is raised in the State court is of minor importance, if, in fact, it was raised and decided. The Act of Congress of 1867 gives jurisdiction to this court over final judgments in the highest courts of the State, in suits 'where is drawn in question the validity of a statute of or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity.' Not a word is said respecting the mode in which it shall be made to appear that such a question was presented for decision. In the present case it was necessarily involved, without

any formal reference to any clause in the Constitution, and it is difficult to see how any such reference could have been made to appear expressly.

"In questions relating to our jurisdiction, undue importance is often attributed to the inquiry whether the pleadings in the State court expressly assert a right under the Federal Constitution. The true test is not whether the record exhibits an express statement that a federal question was presented, but whether such a question was decided and decided adversely to the federal right. Everywhere in our decisions it has been held that we may review the judgments of a State court when the determination or judgment of that court could not have been given without deciding upon a right or authority claimed to exist under the Constitution, laws or treaties of the United States, and deciding against that right. Very little importance has been attached to the inquiry whether the federal question was formally raised. In *Crowell* v. *Randall* (10 Pet., 368), it was laid down, after a review of almost all of our previous decisions, 'that it is not necessary the question should appear on the record to have been raised, and the decision made in direct and positive terms *in ipsissimis verbis*, but that it is sufficient if it appears by clear and necessary intendment that the question must have been raised, and must have been decided, in order to have induced the judgment. This case was followed by *Armstrong et al.* v. *The Treasurer of Athens Co.* (16 *id.*, 281), where it was held sufficient to give this court jurisdiction if it appear from the record of the State court that the federal question was necessarily involved in the decision, and that the court could not have given the judgment or decree which they passed without deciding it.

(443) "* * * Of course, the question is directly presented whether the ordinances are a justification; whether they can and do relieve the debtor from full compliance with the promise; in other words, whether the ordinances are valid and may lawfully be applied to the contracts. The court gave

judgment for the defendant, which would have been impossible had it not been held that they have the force of law, notwithstanding the Constitution of the United States, and the Supreme Court affirmed the judgment. Our jurisdiction, therefore, is manifest."

In *Chicago Life Ins. Co.* v. *Needles*, 113 U. S., 574, it is stated (578):

"* * * At the final hearing, it moved the court, upon written grounds, for a final decree in its behalf; one of which was that the statutes of the State under which these proceedings were had, were in violation of the Constitution of the United States, in that they impaired the obligation of the contract between the State and the company, as well as of the contracts between the company and its policyholders and creditors.

"This motion was denied, and a final judgment rendered perpetually enjoining the company from further prosecution of its business. From that judgment a writ of error was prosecuted to the Supreme Court of the State, where, among other things, was assigned for error the refusal of the court of original jurisdiction to adjudge that the said statutes of Illinois were in violation of the Constitution of the United States. The judgment of the inferior court was, in all things, affirmed by the Supreme Court of the State, and from that judgment of affirmance the present writ of error is prosecuted.

"The Supreme Court of Illinois did not, in terms, pass upon the claim distinctly made there, as in the court of original jurisdiction, that the statutes in question were in derogation of rights and privileges secured to appellant by the Constitution of the United States. But the final judgment necessarily involved an adjudication of that claim; for, if the statutes upon the authority of which alone the auditor of State proceeded are repugnant to the National Constitution, that judgment could not properly have been rendered. This court, therefore, has jurisdiction to inquire whether any right or privilege pro-

tected by the Constitution of the United States has been withheld or denied by the judgment below. And our jurisdiction is not defeated, because it may appear, upon examination of this federal question, that the statutes of Illinois are not repugnant to the provisions of that instrument. Such an examination itself involves the exercise of jurisdiction. The motion to dismiss the writ of error upon the ground that the record does not raise any question of a federal nature must, therefore, be denied."

In *Furman* v. *Nichol*, 8 Wall., 44, is the following (55):

"The main question involved in this suit is of more importance than difficulty; but before we proceed to discuss it, it is necessary to consider the point of jurisdiction which is raised by the defendant in error. The circumstances under which this court is authorized to review the decisions of State tribunals has been so often considered and decided that there is hardly anything left to do but to apply the already well-settled legal principles which govern this class of cases to a particular record, in order to decide whether or not we have jurisdiction to hear and determine the matter in controversy. It would be useless labor to go through with the various adjudications of this court on this subject. It is enough for the purposes of this suit to say that a cause can be removed from a State court into this court under the 25th section of the Judiciary Act of 1789, whenever some one of the questions embraced in it was relied on by the party who brings the cause here, and when the right he claimed it gave him was denied to him by the State court. It is urged that the particular provision of the Constitution which the plaintiffs in error say has been violated in its application to their case should be contained in the pleadings, but this is in no case necessary. If the record shows, either by express averment or by clear and necessary intendment, that the constitutional provision did arise, and that the court below could not have reached the conclusion and

judgment it did reach without applying it to the case in hand, then the jurisdiction of this court attaches. And it need not appear that the State court erred in its judgment. It is sufficient to confer jurisdiction that the question was in the case, was decided adversely to the plaintiffs in error, and that the court was induced by it to make the judgment which it did.

"Testing the case at bar by these rules, it is apparent that it is properly here, and must be disposed of on its merits."

In *Murdock* v. *City of Memphis* (20 Wall.), 87 U. S., 590, it is held (633):

"The omitted clause of Act of 1789 declared that no other error should be regarded as a ground for reversal than such as appears on the face of the record and immediately respects the beforementioned questions.

"It is probable that in determining whether one of those questions was actually raised and decided in the State court, this court has been inclined to restrict its inquiries too much by this express limitation of the inquiry 'to the face of the record.' What was the record of the case was pretty well understood as a common-law phrase at the time that statute was enacted, but the statutes of the states and new proceedings in those courts have changed and confused the matter very much since that time."

* * * * * *

(634) "But, after all, the record of the case, its pleadings, bills of exceptions, judgment, evidence, in short, its record, whether it be a case in law or equity, must be the chief foundation of the inquiry; and while we are not prepared to fix any absolute limit to the sources of the inquiry under the new act, we feel quite sure it was not intended to open the scope of it to any loose range of investigation."

* * * * * *

"But when it appears that the federal question was decided erroneously against the plaintiff in error, we must then reverse the case undoubtedly, if

there are no other issues decided in it than that. It often has occurred, however, and will occur again, that there are other points in the case than those of federal cognizance, on which the judgment of the court below may stand; those points being of themselves sufficient to control the case.

"Or it may be that there are other issues in the case, but they are not of such controlling influence on the whole case that they are alone sufficient to support the judgment.

"It may also be found that notwithstanding there are many other questions in the record of the case, the issue raised by the Federal question is such that its decision must dispose of the whole case.

"In the two latter instances there can be no doubt that the judgment of the state court must be reversed, and under the new act this court can either render its final judgment or decree here, or remand the case to the state court for that purpose."

In *Davidson* v. *New Orleans*, 96 U. S., 97, is the following (102):

"* * * But when, in the year of grace 1866, there is placed in the Constitution of the United States a declaration that 'no state shall deprive any person of life, liberty or property without due process of law,' can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation. It seems to us that a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A., shall be and is hereby vested in B., would, if effectual, deprive A. of his property without due process of law, within the meaning of the constitutional provision."

(107) Mr. Justice BRADLEY: "In the conclusion and general tenor of the opinion just read I concur. But I think it narrows the scope of inquiry as to

what is due process of law more than it should do. * * * "But the court in that case (18 How., 272) expressly holds that it is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as the executive and judicial, power of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law' by its mere will." (p. 276.) "I think, therefore, we are entitled, under the Fourteenth Amendment, not only to see there is some process of law, but, 'due process of law,' provided by the state law when a citizen is deprived of his property; and that, in judging what is 'due process of law,' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law'; but if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law.' Such an examination may be made without interfering with that large discretion which every legislative power has of making wide modifications in the forms and procedure in each case, according as the laws, habits, customs and preferences of the people of the particular state may require."

Spencer v. *Merchant*, 125 U. S., 345, is a special assessment proceedings brought to this court by writ of error to the Supreme Court of the State of New York, to review a judgment in regard to the validity of an assessment for grading and paving a certain street. In regard to the question of jurisdiction, as applied to case under consideration, the attention of the court is called to the following (352):

"The question submitted to the Supreme Court

of the State was whether this assessment on the plaintiff's lot was valid. He contended that the statute of 1881, was unconstitutional and void because it was an attempt by the legislature to validate a void assessment, without giving the owners of the land assessed an opportunity to be heard upon the whole amount of the assessment. He thus directly, and in apt words, presented the question whether he had been unconstitutionally deprived of his property without due process of law, in violation of the first section of the Fourteenth Amendment to the Constitution of the United States, as well as of art. I, sec. 7, of the Constitution of New York; and no specific mention of either constitutional provision was necessary in order to entitle him to a decision of the question by any court having jurisdiction to determine it. The adverse judgment of the Supreme Court, affirmed by the Court of Appeals of the State, necessarily involved a decision against a right claimed under the Fourteenth Amendment to the Constitution of the United States, which this court has jurisdiction to review. *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall., 116, 142; *Murray* v. *Charleston*, 96 U. S., 432, 442; *Furman* v. *Nichol*, 8 Wall., 44, 56; *Chicago Life Ins. Co.* v. *Needles*, 113 U. S., 574, 579.

"The jurisdiction of this court, as is well understood, does not extend to a review of the judgment of the State court, so far as it depended upon the Constitution of the State. *Provident Institution for Savings* v. *Jersey City*, 113 U. S., 506, 514. Yet as the words of the two constitutions are alike in this respect, the decisions of the highest court of the State upon the effect of these words are entitled to great weight."

The Constitution of the State of Illinois contains a provision similar to the section of the Fourteenth Amendment to the Constitution of the United States relied on herein.

From what is shown above, it appears to us that the only conclusion to be drawn is that a federal

question, arising under the Fourteenth Amendment to the Constitution of the United States, was before the Supreme Court of Illinois, and that such question was decided adversely to the contention of the plaintiff in error. To give any other construction to the record is to presume, as it seems to us, that the Chief Justice of the Supreme Court, in allowing the writ to issue, acted without due consideration, and in disregard of the duties imposed upon him, when the application therefor was made.

We feel warranted in anticipating that your Honorable Court will conclude that a federal question was before the trial and Supreme courts, and that the decision of the Supreme Court of Illinois adversely to the contention of plaintiff in error, denied to him the privileges and immunities guaranteed under the Constitution of the United States.

A determination by this court that it has jurisdiction of the subject-matter involved herein will be a complete answer to the argument of counsel for defendant in error that neither a federal question nor the constitutionality of the Act of 1897 was before the Supreme Court of Illinois for consideration.

Counsel for defendant in error made no extended reply to contention of plaintiff in error on the merits of the controversy, which are, that the Act of 1897 is in conflict with the Fourteenth Amendment to the Constitution of the United States, and that sections 42 and 86 of said act are also in conflict with said amendment; and further, that said sections are unconstitutional because they interfere with the right of contract. Nearly the whole defense inter-

posed on behalf of defendant in error is that this court has no jurisdiction because no federal question was raised in the Supreme Court of Illinois affecting the constitutionality of said Act and of sections 42 and 86 thereof; that all questions appearing in the record are local, and that such questions have been decided adversely to plaintiff in error by the Supreme Court of Illinois.

The rule laid down in the authorities cited above apparently justify the position taken by plaintiff in error that this court has jurisdiction of the subject-matter involved in the record, and that the points insisted upon by plaintiff in error are open for decision upon the merits.

As the main defense interposed by defendant in error involves strictly legal questions, plaintiff in error will offer no further suggestions on the question of merits, other than what is set forth under the following heading:

II.

AS TO THE DECISIONS OF THE SUPREME COURT OF ILLINOIS FINDING THAT THE ACT OF 1897, AND SECTIONS 42 AND 86 THEREOF, ARE NOT IN CONFLICT WITH THE CONSTITUTION OF ILLINOIS.

Counsel for defendant in error herein insist that the constitutionality of the Act of 1897, as affected by the Fourteenth Amendment to the Constitution of the United States, was not before the Supreme Court of the State of Illinois for determination. They also urge that the constitutionality of the Act, and of sections 42 and 86 thereof, are local ques-

tions, and that the decision thereof, by the highest court of the State is binding upon this court, and by reason thereof this court is estopped from considering the merits involved in the controversy. To sustain the first contention, counsel refer to the case of *Givens* v. *Chicago*, 188 Ill., 348, where the original Act of 1897 was under consideration by the Supreme Court of Illinois, and it was there determined that such Act was not in conflict with the Constitution of Illinois. It does not appear that a federal question was before that court for determination, and none was passed upon. What its finding would have been had such question been presented and urged is simply a matter for conjecture. Counsel for defendant in error further insist that the constitutionality of sections 42 and 86, as far as the Constitution of Illinois is concerned, has been sustained by the Supreme Court of Illinois in *Hulbert* v. *Chicago*, 213 Ill., 452. This is the case now before the court, and, as shown herein, a federal question was urged before the latter court.

The fact that the Supreme Court of Illinois, in another proceedings, and one in which the present plaintiff in error was not a party, determined that the Act of 1897 was not in conflict with the Constitution of the State of Illinois, is a matter of slight importance to this court, providing said Act is in conflict with the Fourteenth Amendment to the Constitution of the United States.

That the opinion in the *Givens* case, *supra*, did not meet the approval of the entire court, and that it is open to the criticism that it is in conflict with the Constitution of Illinois and the decisions of the Su-

preme Court of that State, is quite clearly shown by the dissenting opinion of Mr. Justice Marshall, appearing in the published reports, and which is, in part, as follows:

"It is manifest that this act deprives the common council of all discretionary power in the matter of making local improvements by special assessment or special taxation. The common council might, perhaps, have the right to refuse to pass an ordinance submitted to it by the board of local improvements. At any rate there is no prohibition against the refusal on the part of the common council to pass such an ordinance. But, if it passes any ordinance, providing for a local improvement, to be paid for by special assessment or special taxation, it can only pass such ordinance, as is submitted to it by the board of local improvements. The common council is forbidden not only to pass but also to consider, any ordinance, for a local improvement, unless the same is first recommended by the board of local improvements. The act robs the common council of the power to take any independent action in the matter, and makes the council a mere agent of the board of local improvements. The common council is reduced by the act to a mere machine for the execution of the will of an outside force, to wit: the board of local improvements. Substantially, and in effect, the act substitutes the board of local improvements for the common council in all matters, relating to the making of local improvements, which involve the exercise of judgment and discretion. The necessity for the improvement, and the nature of it, and the cost of it, are all determined in advance for the common council by the board of local improvements. Even the ordinance for the improvement is framed in advance by the board of local improvements, and submitted to the common council without the power in the latter to change or modify the ordinance, or exercise its own will or judgment in relation thereto, except, as has already been stated, so far as it may have the right to refuse to pass any ordinance.

"Section 9 of Article 9 of the Constitution provides, that 'the General Assembly may vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessment, or by special taxation of contiguous property, or otherwise.' By this provision of the Constitution only the 'corporate authorities' of cities can be vested by the legislature with power to make local improvements by special assessment or special taxation. As the Act of June 14, 1897, vests the board of local improvements with the power to make such improvements by special assessment or special taxation, such power is not rightfully conferred, unless the board of local improvements, provided for in the act, can be regarded as the corporate authority of the city, in which it performs its functions. Technically, the common council, which is, undoubtedly, the corporate authority of the city, makes the local improvement provided for in the act, because it passes the ordinance for the improvement. But, inasmuch as it passes such an ordinance only, as is prepared for it by the board of local improvements, and does so at the dictation of the board, the board and not the common council, is really, and, in effect, the authority, which makes the improvement.

"The question then arises, whether the boards of local improvements, created by the act in question, are 'corporate authorities' within the meaning of section 9 of article 9 of the Constitution.

"Who are the 'corporate authorities' of cities, towns and villages, whom the Constitution clothes with the power to make local improvements by special assessment or special taxation of contiguous property, or otherwise? They have been defined by this court in many decisions.

"It is clear that the members of the board of local improvements, provided for by the Act of June 14, 1897, are not 'corporate authorities' within the meaning of the Constitution. * * * These five members, constituting the board, are appointed, so far as the City of Chicago is concerned, by the

mayor of the city. They are not officers elected by the people of the city. Nor is the Act of June 14, 1897, which provides for their appointment, an act which was adopted by the votes of the people of the City of Chicago."

(Dissenting opinion of Mr. Justice MAGRUDER in *Givens* v. *City of Chicago*, 188 Ill., 356.)

Plaintiff in error feels justified in the position taken herein, that the Act of 1897, which attempts to delegate legislative power, is not only in conflict with the Constitution of the State of Illinois, but it is also in conflict with the Fourteenth Amendment to the Constitution of the United States, for the reason, among others, that it seeks to deprive him of his property without due process of law. Further than this, said act attempts to establish a system of taxation without representation. He, therefore, respectfully asks this Honorable Court to hold said act to be in conflict with the Constitution of the United States.

III.

AS TO SECTIONS 42 AND 86 OF THE IMPROVEMENT ACT.

Notwithstanding the argument of counsel for defendant in error, plaintiff in error insists that the right of contract is involved in the above sections, and, that under said sections, the board of local improvements is not permitted to avail itself of the fluctuations of the money market by issuing bonds at the most favorable rate of interest. That the property owner is concerned in the rate of interest fixed upon improvement bonds ought to be conceded, because he is the one who furnishes the

money, and who is really responsible for the retirement of such bonds. The Local Improvement Act, however, has sought to curtail, in every manner possible, the right of property owners to protest against a local improvement and to contest the making thereof. This assertion we feel will be fully justified by a perusal of the various sections of the act set forth in the original brief.

Without making further suggestions under the above heading, the plaintiff in error confidently anticipates this Honorable Court will agree with his contention that said sections do interfere with the right of contract, and that they are in conflict with the Fourteenth Amendment to the Constitution of the United States.

CONCLUSION.

For the various causes set forth in the record and briefs herein, plaintiff in error feels warranted in bringing the matters involved before your Honorable Court for determination. Trusting that our contention may receive the favorable consideration of this court, the foregoing is

Respectfully submitted,

GEO. W. WILBUR,
Counsel for Plaintiff in Error.

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Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1905.

No. 248.

THOMAS H. HULBERT,
Plaintiff in Error,
vs.
THE CITY OF CHICAGO,
Defendant in Error

Error to Supreme Court of Illinois.

BRIEF FOR DEFENDANT IN ERROR.

JAMES HAMILTON LEWIS,
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ATTORNEY FOR DEFENDANT IN ERROR.

CHARLES H. MITCHELL,
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OF COUNSEL.

BARNARD & MILLER, PRINTERS, CHICAGO

No. 19,736.

IN THE

Supreme Court of the United States.

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THOMAS H. HULBERT, *Plaintiff in Error,* *vs.* THE CITY OF CHICAGO, *Defendant in Error.*	}	Error to Supreme Court of Illinois.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

The facts in this case, as stated in the brief of counsel for the plaintiff in error, are substantially correct.

There are only two questions which counsel seeks to present for review by this court, and they are neither new nor difficult, but are controlled entirely by the principles announced in repeated decisions of this court. They are thus respectively stated by counsel on page 18 of his brief:

> 1. "The act entitled 'An Act Concerning Local Improvements,' passed June 14, 1897, and amendments thereto, is contrary to section 2, article 2 and section 9, article 9 of the Constitution of Illinois.
>
> "The Board of Local Improvements is not a municipal corporation, and it has no authority to make special assessments."

2. "Sections 42 and 86 of said act are unconstitutional and void because they interfere with the right of contract by fixing the rate of interest on assessments and improvement bonds at five per cent."

The answers which we offer in reply to these propositions are as follows:

Brief of points and authorities for defendant in error.

I.

THE FIRST CONTENTION OF COUNSEL FOR PLAINTIFF IN ERROR THAT THE LOCAL IMPROVEMENT ACT OF ILLINOIS OF JUNE 14, 1897, IS IN VIOLATION OF SECTION 9 OF ARTICLE 9 OF THE CONSTITUTION OF ILLINOIS IN THAT IT ATTEMPTS TO CONFER ON THE BOARD OF LOCAL IMPROVEMENTS THE POWERS WHICH THE SAID SECTION OF THE CONSTITUTION PROVIDES SHALL BE VESTED IN THE CORPORATE AUTHORITIES OF THE MUNICIPALITY, AND THAT THE BOARD OF LOCAL IMPROVEMENTS IS NOT A CORPORATE AUTHORITY CANNOT BE REVIEWED BY THIS COURT FOR THE REASON THAT THIS QUESTION WAS NOT DECIDED NOR EVEN NOTICED IN THE OPINION OF THE SUPREME COURT OF ILLINOIS, AND THE RECORD DOES NOT SHOW THAT IT WAS CALLED TO THE ATTENTION OF THAT COURT.

The proposition must be regarded as settled that in order to give this court the power to re-examine the judgment of the State court, the title, right, privilege or immunity must be specially set up or claimed at the proper time and in the proper way,

and that the right on which the party relies must have been called to the attention of the court in some proper way, and the decision of the court must have been against the right claimed.

Oxley Stave Co. v. *Butler Co.*, 166 U. S., 648.

Sayward v. *Denny*, 158 U. S., 180-183-184-186.

Levy v. *Sup. Ct. of San Francisco*, 167 U. S., 175, 177.

C. & N. W. Ry. Co. v. *Chicago*, 164 U. S., 454, 457.

Ansbro v. *U. S.*, 159 U. S., 695, 698.

Hoyt v. *Shelden*, 1 Black, 518, 521.

Keokuk & Hamilton Bridge Co. v. *Illinois*, 175 U. S., 626.

Although the State court may have decided a Federal question, it must appear that the particular Federal question sought to be raised here was also decided.

Capital City Dairy Co. v. *Ohio*, 183 U. S., 238, 248.

Chapin v. *Fye*, 179 U. S., 127.

The fact that the opinion of the State court makes no reference to the particular question sought to be presented in this court, may be considered in determining whether the question was called to the attention of the state court.

Oxley Stave Co. v. *Butler County*, 166 U. S., 648, 653, 655.

Kipley v. *Illinois*, 170 U. S., 182, 186.

C. & N. W. Ry. Co. v. *Chicago*, 164 U. S., 454, 457.

Mich. Sugar Co. v. *Michigan*, 185 U. S., 112, 113.

N. Y. Cen. R. R. Co. v. *New York*, 186 U. S., 269, 273.

This court will recognize and be governed by the rule of practice in a State court prescribing the requirements to be observed in order to save a question for review in that court.

Erie Railroad Co. v. *Purdy*, 185 U. S., 148, 153.

According to the well settled rule of practice in the Supreme Court of Illinois, every error must be specifically pointed out in the assignments of error, and an error not assigned is not open to review.

Berry v. *City of Chicago*, 192 Ill., 154, 155.

Skakel v. *People*, 188 Ill., 291, 294.

Gibler v. *City of Mattoon*, 167 Ill., 18, 24.

The very error relied upon should be definitely and clearly presented, and the court not compelled to go beyond the assignment itself to learn what the question is.

Stanley v. *Chi. Tr. & Sav. Bank*, 61 Ill. App., 257, 262.

Errors assigned, but not noticed or relied on in the brief and argument of counsel, will be regarded as waived or abandoned.

Lewis v. *King*, 180 Ill., 259, 266.

Dorn v. *Ross*, 177 Ill., 225, 228.

Keyes v. *Kimmell*, 186 Ill., 109, 114.

Harris v. *Shebek*, 151 Ill., 287, 294.

II.

EVEN THOUGH IT SHOULD BE HELD THAT THE FIRST CONTENTION OF COUNSEL THAT THE LOCAL IMPROVEMENT ACT OF ILLINOIS OF JUNE 14, 1897, IS UNCONSTITUTIONAL, BECAUSE IT CONFERS POWERS ON THE BOARD OF LOCAL IMPROVEMENTS WHICH THE CONSTITUTION PROVIDES SHALL BE VESTED IN CORPORATE AUTHORITIES AND THAT THE BOARD OF LOCAL IMPROVEMENTS ARE NOT CORPORATE AUTHORITIES, WAS SUFFICIENTLY SET UP OR CLAIMED IN THE SUPREME COURT OF ILLINOIS TO AUTHORIZE THIS COURT TO REVIEW IT, YET WE MAINTAIN THAT THE PROPOSITION CONTENDED FOR BY COUNSEL DOES NOT INVOLVE A FEDERAL, BUT ONLY A LOCAL QUESTION, AND, FOR THAT REASON, CANNOT BE CONSIDERED BY THIS COURT.

The United States Supreme Court has no power to review a State statute on the ground solely that it is repugnant to the state constitution.

Kipley v. *Illinois*, 170 U. S., 182, 186.

Miller v. *Cornwall R. R. Co.*, 168 U. S., 131, 134.

A special assessment is levied under the taxing power of a state, and is a species of taxation.

French v. *Barber Asphalt Pav. Co.*, 181 U. S., 324, 343, 344.

C. & A. R. R. Co. v. *City of Joliet*, 153 Ill., 649.

County of Adams v. *City of Quincy*, 130 Ill., 566.

It is not the province of this court ordinarily to interfere with the policy of the revenue laws of the

state or with statutes providing for making local improvements by special assessment.

French v. *Barber Asphalt Pav. Co.*, 181 U. S., 324.

Witherspoon v. *Duncam*, 4 Wall., 210, 217.

Williams v. *Supervisors of Albany*, 122 U. S., 154, 164.

Shaefer v. *Werling*, 188 U. S., 516, 517.

It has been held by this court that the Supreme Court of Illinois, decided a local, and not a federal, question when it held that it was competent, on a new assessment, to determine the question of benefits from the proof, even though in so doing a different result was reached than that which had been arrived at when the former assessment, which had been set aside, was made.

Lombard v. *West Chi. Park Commrs.*, 181 U. S., 33, 34.

In the apportionment of assessments for improvements "due process of law" is afforded to the taxpayer if he is given an opportunity to be heard before the body making the assessment; and, so far as the Federal statute is concerned, the State legislature may provide that such hearing shall be conclusive.

Hibben v. *Smith*, 191 U. S., 310, 322, 323.

If a taxpayer be given an opportunity to test the validity of the tax at any time before it is made final, where the proceedings for review take place before a board having a quasi judicial character, or before a tribunal provided by the State for the purpose of determining such questions, due process of law is not denied.

Hodge v. *Muscatine County*, 196 U. S., 276, 281.

The Federal courts ought not to interfere when what is complained of is the enforcement of a state statute applicable to all persons in like circumstances and conditions; but only when there is some abuse of law amounting to confiscation of property, or deprivation of personal rights.

French v. *Barber Asphalt Pav. Co.*, 181 U. S., 324.

A state statute authorizing the paving of streets and the charging of the cost therefor on the abutting property according to frontage, without reference to any benefits to the property, is held to be an orderly procedure under a scheme of local improvements prescribed by the legislature and approved by the courts of the State as consistent with constitutional principles.

French v. *Barber Asphalt Paving Co.*, 181 U. S., 324, 326, 346.

III.

THE PRECISE QUESTION INVOLVED IN THE FIRST CONTENTION OF COUNSEL FOR PLAINTIFF IN ERROR, THAT THE LOCAL IMPROVEMENT ACT OF ILLINOIS OF JUNE 14, 1897, IS UNCONSTITUTIONAL, BECAUSE IT CONFERS ON THE BOARD OF LOCAL IMPROVEMENTS POWERS WHICH CAN ONLY BE VESTED IN CORPORATE AUTHORITIES AND THAT THE BOARD OF LOCAL IMPROVEMENTS ARE NOT CORPORATE AUTHORITIES, WAS DECIDED ADVERSELY TO COUNSEL'S CONTENTION BY THE SUPREME COURT OF ILLINOIS IN THE CASE OF GIVENS V. CITY OF CHICAGO, 188 ILL., 348; AND WE MAINTAIN THAT THAT DECISION OF THE SUPREME COURT OF ILLINOIS, WHICH UPHOLDS THE VALIDITY OF THE STATUTE COMPLAINED OF, IS CONCLUSIVE UPON THIS COURT.

The decision of the highest court of a state that an act of the legislature is not in conflict with the provision of the state constitution is conclusive on the Federal courts, except where the Federal constitution and laws are concerned.

22 Am. & Eng. Ency. of Pl. & Pr., 326.

The decision of the highest court of a State sustaining the validity of a statute is conclusive in this court as to any question of conflict between it and the state constitution.

Merchants' and Manufacturers' Bank v. *Penna.*, 167 U. S., 461.

Forsyth v. *Hammond*, 166 U. S., 506, 518.

The construction placed by the highest court of a state on a statute providing for paving streets and distributing the assessment therefor, is conclusive upon this court.

Schaefer v. *Werling*, 188 U. S., 516, 517.

IV.

THE CONSTRUCTION OF SECTIONS 42 AND 86 OF THE LOCAL IMPROVEMENT ACT OF ILLINOIS, OF JUNE 14, 1897, WHICH COUNSEL FOR PLAINTIFF IN ERROR CONTENDS IN HIS SECOND POINT ARE UNCONSTITUTIONAL "BECAUSE THEY INTERFERE WITH THE RIGHT OF CONTRACT BY FIXING THE RATE OF INTEREST ON ASSESSMENTS AND IMPROVEMENT BONDS AT FIVE PER CENT.," INVOLVES A LOCAL, AND NOT A FEDERAL QUESTION; AND THE INTERPRETATION PLACED ON SAID SECTIONS BY THE SUPREME COURT OF ILLINOIS IS, THEREFORE, BINDING ON THIS COURT.

Sections 42 and 86 of the Local Improvement Act fixing the rate of interest upon deferred installments of a special assessment, and the bonds issued therefor, at 5 per cent., are not unconstitutional, as depriving property owners of property without due process of law by precluding the city from negotiating for a lower rate of interest.

Hulbert v. *City of Chicago*, 213 Ill., 452, 455, 456 (decided December 22, 1904; rehearing denied February 9, 1905).

(This is the case now before the court.)

The statute fixing the rate of interest on special assessment installments and bonds at 5 per cent. is not unconstitutional, as precluding the right of property owners to contract, through the city, for a less rate.

Gage et al. v. *City of Chicago*, 216 Ill., 107, 109, 110 (decided June 23, 1905).

V.

SECTIONS 42 AND 86 OF THE LOCAL IMPROVEMENT ACT OF ILLINOIS, OF JUNE 14, 1897, WHICH COUNSEL FOR PLAINTIFF IN ERROR IN HIS SECOND CONTENTION CLAIMS ARE UNCONSTITUTIONAL "BECAUSE THEY INTERFERE WITH THE RIGHT OF CONTRACT BY FIXING THE RATE OF INTEREST ON ASSESSMENTS AND IMPROVEMENT BONDS AT FIVE PER CENT." CONFER NO CONTRACTUAL RIGHTS WHATEVER ON A PROPERTY OWNER, AND, THEREFORE, NECESSARILY DO NOT IMPAIR OR ABRIDGE ANY SUCH RIGHTS. BUT WE SUBMIT THAT EVEN IF THEY DID CONFER CERTAIN CONTRACTUAL RIGHTS UPON A PROPERTY OWNER, THEY WOULD NOT IMPAIR

SUCH RIGHTS IN PROVIDING FOR A FIXED RATE OF INTEREST ON INSTALLMENTS OF SPECIAL ASSESSMENTS AND SPECIAL ASSESSMENT BONDS.

The construction of local improvements by special assessment is purely and entirely a statutory proceeding; and a property owner posseses no rights whatever in respect thereto independently of statute, but all of his rights in that regard are derived solely from the statute.

There is no special provision in the constitution of Illinois which imposes any restrictions on the power of the legislature in respect to regulating the interest on assessments and special assessment bonds.

Regulating the interest on special assessment bonds or installments of special assessments being purely a statutory proceeding, cannot be held to interfere with or abridge any inherent right of contract guaranteed by that general clause of the constitution, either of the State of Illinois or of the United States, which provides substantially that no person shall be deprived of life, liberty or property without due process of law.

In fixing the rate of interest on improvement bonds or installments of a special assessment, the legislature of Illinois was simply providing one of the steps in the procedure for raising by special assessment the amount of money required for a proposed public improvement; and in the exercise of this taxing power, the Supreme Court of the United States will not ordinarily interfere.

As a general proposition, interest is solely a creature of statute.

Fowler v. *Harts*, 149 Ill., 582, 597.

Insurance Co. v. *Refrigerating Co.*, 162 Ill., 322, 323.

City of Chicago v. *Allcock*, 86 Ill., 384, 385.

I. C. R. R. Co. v. *Cobb, Blaisdell & Co.*, 72 Ill., 148, 152.

ARGUMENT.

As has been stated, only the two following questions are urged by counsel for the plaintiff in error for review by this court:

1. "The act entitled 'An Act Concerning Local Improvements,' passed June 14, 1897, and amendments thereto, is contrary to section 2, article 2, and section 9, article 9, of the Constitution of Illinois.

"The Board of Local Improvements is not a municipal corporation, and it has no authority to make special assessments."

2. "Sections 42 and 86 of said Act are unconstitutional and void, because they interfere with the right of contract by fixing the rate of interest on assessment and improvement bonds at 5 per cent."

It will be observed that counsel for plaintiff in error in stating the questions for the consideration of this court, makes no reference whatever to the Constitution of the United States, but apparently only contends that the constitution of Illinois has been contravened.

It will also be perceived that in his argument, counsel discusses both questions almost entirely in relation to the constitution of Illinois. He makes no attempt to define specifically the way in which the Constitution of the United States is violated. The mere general statements that the plaintiff in error "is deprived of certain rights guaranteed to him by the 14th amendment to the Constitution of the United States" and that "this proceeding

is contrary to the law of the land and in violation of the 14th amendment to the Constitution of the United States" comprise all of the argument of counsel in this respect on both contentions. How the amendment is violated, or what precise right under it plaintiff in error is deprived of, counsel does not point out either in his brief or argument.

Nor do the assignments of error in this court by plaintiff in error (Trans. of Record, p. 38) properly state the questions which counsel desires this court to consider. Some of the assignments allege error on the part of the Supreme Court of Illinois, and others allege error on the part of the County Court of Illinois; but in none is there a specific statement of the Federal questions which counsel is requesting this court to examine.

The following language used by this court in the case of *Davidson* v. *New Orleans*, 96 U. S., 97, 104, we submit, is particularly applicable to this case:

> "There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the 14th amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinion of every unsuccessful litigant in a State court, of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded."

Assuming, however, that the assignments of error in this court of plaintiff in error, properly raise the questions urged for review by counsel for

plaintiff in error, we will discuss those questions in the order in which counsel has stated them.

I.

The first contention of counsel for plaintiff in error, that the Local Improvement Act of Illinois of June 14, 1897, is in violation of Section 9 of Article 9 of the Constitution of Illinois, in that it attempts to confer on the Board of Local Improvements the powers which the said section of the Constitution provides shall be vested in the corporate authorities of the municipality and that the Board of Local Improvements is not a corporate authority, cannot be reviewed by this court, for the reason that this question was not decided nor even noticed in the opinion of the Supreme Court of Illinois, and the record does not show that it was called to the attention of that court.

We submit that the question above stated was not "specially set up or claimed" in the Supreme Court of Illinois (the judgment of which this court is requested to re-examine on this writ of error) in accordance with the decisions of this court construing Section 709 of the Revised Statutes of the United States.

It will be found on an examination of the assignments of error in the Supreme Court of Illinois (Transcript of Record, pp. 28, 29) that there is not a single assignment which expressly raises this

question or properly calls it to the attention of the Supreme Court of Illinois. The only theory on which it could be contended that the question was involved in the assignments of error in that court would be to claim that it was raised impliedly or inferentially by the assignments numbered 1, 2 and 11, which allege respectively, in general terms, (1) that the County Court erred in not sustaining the objections of appellant; (2) that the County Court erred in overruling the objections of appellant; (11) and that the finding of the County Court is contrary to the law and to the evidence.

For the convenience of the court we will here set out the said assignments of error of the plaintiff in error in the Supreme Court of Illinois, as they appear in the Transcript of Record on pages 28 and 29:

"In the Supreme Court of Illinois,
of the October Term, 1904.

Thomas H. Hulbert, *Appellant*,
vs.
The City of Chicago, *Appellee*.

Assignment of Errors.

Now comes the above named appellant, by George W. Wilbur, his attorney, and says that in said record and proceedings there are manifest errors, in this, that is to say:

1. Said County Court erred in not sustaining the objections of appellant, and each thereof.

2. Said County Court erred in overruling the objections of appellant, and each thereof.

3. Said County Court erred in admitting improper evidence on behalf of appellee and over the objections of appellant.

4. Said County Court erred in refusing to receive proper evidence offered on behalf of appellant.

5. Said County Court had no jurisdiction to entertain said proceedings for the reason that the petition and the ordinance which is the basis thereof is not in accordance with the statute, and because said ordinance does not state the nature, character, locality and description of the proposed improvement.

6. Said County Court had no jurisdiction to enter a judgment of confirmation in said proceedings for the reason that the Board of Local Improvements did not adopt a preliminary resolution for the proposed improvement in the manner and form required by law; neither was such alleged resolution transcribed into the records of said board in the manner required by statute. Said resolution as to the time for a public hearing and other jurisdictional matters is not in accordance with the act under which said proceedings were instituted.

7. The court had no jurisdiction to enter a judgment of confirmation herein for the reason that the alleged estimate of the cost of the improvement was not made by the proper officer, and it is not in the form required by law. The officer making the same did not certify that such estimate does not exceed the probable cost of the proposed improvement and the lawful expenses attending the same. Said estimate is in other respects contrary to the statute.

8. Said County Court had no jurisdiction to enter a judgment of confirmation herein because the proceedings before said Board of Local Improvements appearing in the record herein are not in accordance with the statute.

9. The ordinance herein is void because it provides for the collection of interest on the first installment of said assessment.

10. The County Court erred in not finding that the property of appellant was assessed more than its proportionate share of the cost of said improvement, and more than it will be benefited by reason of the construction of the proposed improvement.

11. The finding of the County Court is contrary to the law, and it is also contrary to the evidence.

And for divers other errors appearing in said record and proceedings, appellant prays that said judgment of said County Court as to his property be set aside and held for naught.

Respectfully submitted.

GEORGE W. WILBUR,
Attorney for Appellant."

In their opinion in this case the Supreme Court of Illinois not only did not decide the question under discussion, but did not even refer to it.

It is true that the objections filed in the County Court, the judgment of which was reviewed directly by the Supreme Court of Illinois, claimed a violation of the Constitution of Illinois and of the Fourteenth Amendment to the Constitution of the United States; but as we have stated, the claim was not specifically renewed in the Supreme Court of Illinois, and according to the well settled rule of practice in Illinois, every error must be specifically pointed out in the assignments of error in the Supreme Court before it will be reviewed by that Court; and an error not so set out is not open to review.

Berry v. *City of Chicago*, 192 Ill., 154, 155.
Skakel v. *The People*, 188 Ill., 291, 294.

The very error relied upon should be definitely and clearly presented, and the court should not be compelled to go beyond the assignment itself to learn what the question is.

Stanley v. *Chicago Trust & Sav. Bank*, 61 Ill. App., 257, 262.

And errors assigned, but not noticed or relied on in the brief or argument of counsel, will be regarded as waived or abandoned.

Lewis v. *King*, 180 Ill., 259, 266.
Dorn v. *Ross*, 177 Ill., 225, 228.
Keyes v. *Kimmell*, 186 Ill., 109, 114.
Harris v. *Shebek*, 151 Ill., 287, 294.

In view of the above rule of practice in Illinois, since the opinion of the Supreme Court of Illinois makes no reference whatever to this particular question, the only reasonable conclusion is that it was not called to the attention of the Court; and this presumption is further strengthened by the fact that the Supreme Court of Illinois did consider the second contention of counsel for plaintiff in error, in which it was claimed that a constitutional right of contract was violated by the provision of the Local Improvement Act regulating the rate of interest on improvement bonds. It is true the Supreme Court of Illinois only considered that question in relation to the State Constitution, but the fact that it reviewed that question at all, and did not even remotely refer to the other, strengthens the presumption that the latter was not presented for consideration, but was abandoned.

The rule is so well settled in this court, and has been repeated so often, that a Federal question which was not specifically raised in the assignments of error in the State court, or in some proper way called to the attention of that Court, will not be considered in this Court for the first time, that it is hardly necessary to cite the decisions. A mere statement of the rule is sufficient. However, we will cite

the following authorities, which are directly in point, without quoting from them:

Oxley Stave Co. v. *Butler County*, 166 U. S., 648.

Hoyt v. *Shelden*, 1 Black, 518, 521.

Sayward v. *Denny*, 158 U. S., 180, 183, 184, 186.

Chapin v. *Fye*, 179 U. S., 127.

Keokuk & Ham. Br. Co. v. *Ill.*, 175 U. S., 626.

It has also been expressly held by this court that, although the State court may have decided a Federal question, it must appear that the particular Federal question urged for review by this Court was also decided.

Capital City Dairy Co. v. *Ohio*, 183 U. S., 238, 248.

And in the following decisions the fact that the opinion of the State court made no reference to the particular question sought to be presented in this Court appears to be of controlling importance in determining whether the question was called to the attention of the State court:

Oxley Stave Co. v. *Butler County*, 166 U. S., 648-653-655.

Kipley v. *Illinois*, 170 U. S., 182-186.

C. & N. W. Ry. Co. v. *Chicago*, 164 U. S., 454-457.

Michigan Sugar Co. v. *Michigan*, 185 U. S., 112-113.

New York Central R. R. Co. v. *New York*, 186 U. S., 269-273.

In the case of *Oxley Stave Co.* v. *Butler County*, 166 U. S., 648, 655, *supra*, the court said, in part (pp. 653, 655):

> "Looking into the record, we do not find that any reference was made in the court of original jurisdiction to the Constitution of the United States. Nor can it be inferred from the opinion of the Supreme Court of Missouri that that court was informed by the contention of the parties that any federal right, privilege or immunity was intended to be asserted. For aught that appears the state court proceeded in its determination in the cause without any thought that it was expected to decide a Federal question."

In the case of *Chicago & Northwestern Ry. Co.* v. *Chicago*, 164 U. S., 454-457, *supra*, the court said in part (p. 457):

> "It is assigned in this court for error that the judgment of the court of original jurisdiction had the effect to deprive the railroad company of its property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States. But the record does not show that the company specially set up or claimed in the state courts, or either of them, any right under the Constitution of the United States. It does not appear that the attention even of the trial court was called to the fact that the company, in any form or for any purpose, invoked the protection of that instrument. Nor does it appear from the record that any Federal right was specially set up or claimed in the Supreme Court of the state. * * * In view of these assignments of error, it is not strange that the Supreme Court of Illinois made no reference in its opinion to the clause of the Constitution of the United States which, in this court for the first time, is invoked to sustain the proposition that the company's property has been taken without due process of law."

In the case of *Michigan Sugar Co.* v. *Michigan*, 185 U. S., 112-113, *supra*, the court said, in part p. 113):

> "The Supreme Court of the state did not refer to the Federal Constitution or consider and decide any Federal question. For aught that appears the court proceeded in its determination of the cause without any thought that it was disposing of such a question."

In the case of *New York Central Railroad Co.* v. *New York*, 186 U. S., 269, 273, *supra*, the court said, in part (p. 273):

> "It is hardly necessary to say that the raising of such a question in the assignments of error in this court is insufficient. Not only was there no Federal question raised in the record, but the appellate division made no allusion to such a question."

It may be that if the question under discussion had been properly raised by the assignments of error in the Supreme Court of Illinois, the mere failure of that Court to dispose of the question would not deprive this Court of the jurisdiction to review it. But we maintain that the record shows that the assignments of error in the Supreme Court of Illinois did not properly present this question for review by the Supreme Court of Illinois, and that the Supreme Court of Illinois did not notice or pass upon it.

We submit that the question under discussion cannot be reviewed by this court.

II.

Even though it should be held that the first contention of counsel that the Local Improvement Act of Illinois of June 14, 1897, is unconstitutional, because it confers powers on the Board of Local Improvements which the Constitution provides shall be vested in corporate authorities, and that the Board of Local Improvements are not corporate authorities, was sufficiently set up or claimed in the Supreme Court of Illinois to authorize this court to review it; yet we maintain that the proposition contended for by counsel does not involve a Federal, but only a local, question, and for that reason cannot be considered by this court.

Assuming that the record in the Supreme Court of Illinois shows that the question under discussion was properly raised in that court (which we deny), we submit that it involves only a local and not a federal question. That part of the Constitution of Illinois which counsel claims is violated by the Local Improvement Act of Illinois of June 14, 1897, is as follows:

> "The General Assembly may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment or special taxation of contiguous property, or otherwise."
>
> Section 9, Article 9, Constitution of Illinois.

Under this provision, counsel contends that the

Legislature of Illinois cannot confer power to make local improvements by special assessment or by special taxation of contiguous property or otherwise, upon any municipal officer or officers, or body of officials other than those which are legally known as "corporate authorities." And counsel further contends that the Board of Local Improvements of the City of Chicago are not "corporate authorities" in the sense of this constitutional provision. But we submit that these contentions do not even remotely involve a Federal question. It seems to us, on the authorities, too plain for argument that the question under consideration involves only a local rule of law in respect to the procedure in Illinois for collecting taxes, of which a special assessment is a species, and that the Constitution of the United States is no way drawn in question. Whether the Local Improvement Act, in conferring certain powers, in respect to making local improvements by special assessment, on the Board of Local Improvements violates the provision of the Constitution of Illinois, above cited, is immaterial, in so far as the jurisdiction of this court is concerned. The rule is too well settled to be disputed that the Supreme Court of the United States have no power to review a State statute on the ground solely that it is repugnant to the state Constitution.

Kipley v. *Illinois*, 170 U. S., 182-186.
Miller v. *Cornwall*, 168 U. S., 131, 134.

The rule is equally well settled that it is not the province of this Court to interfere with the policy

of the revenue laws of the State or with the State procedure for the collection of taxes.

French v. *Barber Asphalt Paving Co.*, 181 U. S., 324.

Witherspoon v. *Duncan*, 4 Wall., 210, 217.

Williams v. *Supervisors of Albany*, 122 U. S., 154, 164.

And it certainly will not be denied that a special assessment is levied under the taxing power and is a species of taxation.

French v. *Barber Asphalt Paving Co.*, 181 U. S., 324.

C. & A. R. R. Co. v. *City of Joliet*, 153 Ill., 649.

County of Adams v. *City of Quincy*, 130 Ill., 566.

In the particular cases which we will cite, in which this court has been asked to review state statutes providing for the construction of local improvements by special assessment, although the precise question here involved was not decided, yet we submit that the principles announced, control the present case and sustain our contention that the question is merely a local one in respect to the collection of taxes, in no way involving a federal question.

In the case of *Hibben* v. *Smith*, 191 U. S., 310, 322, 323, where, among other things, it was urged that certain statutory provisions in a special assessment act providing how a board of trustees should be composed were unconstitutional, this court said (p. 323):

"The sole remaining question arises upon the allegations contained in the answer and cross-complaint, that all the members of the board of trustees were residents of the town and tax payers therein and that two members of the board were owners of lots abutting upon the improvement and assessed therefor at the same rate as the others.

"The objection to the tribunal constituted by the legislature of Indiana, which the plaintiff in error makes in this particular instance, is, that it results in making the person a judge in his own case and that hence any judgment of a tribunal thus constituted is absolutely void and may be attacked, as it is attacked in this case, collaterally. It is stated that to impose an assessment, which is the same as a judgment under such circumstances, is to take the lot owners property without due process of law and violates, thereby the Federal Constitution. We think the first objection that all of the members of the board of trustees were residents of and tax payers in the town, is wholly unimportant. We have not the slightest doubt of the power of the legislature of a State, unless hampered by some special constitutional provision, to create a tribunal in a city or town such as the Common Council or Board of Trustees, to make an assessment and that such assessment would be valid notwithstanding the fact that every member of the board was a tax payer of the city or the town. It is a matter of legislative discretion as to how such a board shall be constituted and we hazard nothing in saying that it is quite common throughout the country for the legislatures of the states to create a tribunal for levying assessments for local improvements in a manner precisely like the case in question. It is not at all analogous even in principle to a judge of a court acting in a case in which he is personally interested * * *. The provisions of the 14th amendment

do not cover such an objection as is now under consideration. The general system of procedure for the levying and collection of taxes which is established in this country is, within the meaning of the Constitution due process of law. *Kelly* v. *Pittsburgh*, 104 U. S., 78. A provision made by the legislature of a state in relation to the manner of levying an assessment for a local improvement is within this principle a proceeding for the levying and collection of taxes and unless it be in violation of some particular provision of the federal constitution, it will be upheld in this court. The 14th amendment, it has been held, legitimately operates to extend to the citizens and residents of the states the same protection against arbitrary state legislation, affecting life, liberty and property, as is offered by the 5th amendment against similar legislation by Congress; but that the Federal courts ought not to interfere when what is complained of amounts to the enforcement of the laws of a State applicable to all persons in like circumstances and conditions, and that the Federal courts should not interfere unless there is some abuse of law amounting to confiscation of property or a deprivation of personal rights such as existed in the case of *Norwood* v. *Baker*, 172 U. S., 269.

"These principles have been reiterated in a series of cases reported in the 181 U. S. commencing with *French* v. *Barber Asphalt Paving Co.*, at p. 324 of that volume.

"The facts contained in the objection now under discussion do not in our judgment constitute any violation of the Federal Constitution or result in the taking of the property of the plaintiff in error without due process of law as that term is understood, when used in the Constitution of the United States."

In the case of *French* v. *Barber Asphalt Paving Co.*, 181 U. S., 324, in which a state special assess-

ment act was attacked on the ground that it was in violation of the 14th amendment to the Constitution of the United States, because it authorized the paving of streets and the charging of the cost thereof on abutting property owners according to the frontage, without reference to any benefits to the property on which the charge was made, this court held, among other things, that it was not the intention of the 14th amendment to subvert the systems of the states pertaining to general and special taxation. And after a learned and elaborate review of the cases arising under the provisions of the 5th and 14th amendments to the Constitution of the United States, the court said (pp. 343, 344):

> "We do not deem it necessary to extend this opinion by referring to the many cases in the state courts, in which the principles of the foregoing cases have been approved and applied. It will be sufficient to state the conclusions reached, after a review of the state decisions, by two text writers of high authority for learning and accuracy:
>
> "'The major part of the cost of a local work is sometimes collected by general tax, while a smaller portion is levied upon the estates specially benefited.
>
> "'The major part is sometimes assessed on estates benefited, while the general public is taxed a smaller portion in consideration of a smaller participation in the benefits.
>
> "'The whole cost in other cases is levied on lands in the immediate vicinity of the work.
>
> "'In a constitutional point of view, either of these methods is admissible, and one may sometimes be just and another at other times. In other cases it may be deemed reasonable to make the whole cost a general charge, and levy no special assessment whatever. The question

is legislative, and, like all legislative questions, may be decided erroneously; but it is reasonable to expect that, with such latitude of choice, the tax will be more just and equal than it would be were the legislature required to levy it by one inflexible and arbitrary rule.' Cooley on Taxation, 447.

"'The courts are very generally agreed that the authority to require the property specially benefited to bear the expense of local improvements is a branch of the taxing power, or included within it. * * * Whether the expense of making such improvements shall be paid out of the general treasury, or be assessed upon the abutting or other property specially benefited, and, if in the latter mode, whether the assessment shall be upon all property found to be benefited, or alone upon the abutters, according to frontage or according to the area of their lots, is according to the present weight of authority considered to be a question of legislative expediency.' Dillon's Municipal Corporations, Vol. 2, Sec. 752, 4th Ed."

And, in concluding their opinion, the court said (p. 346):

"What was complained of was an orderly procedure under a scheme of local improvements prescribed by the legislature and approved by the courts of the state as consistent with constitutional principles."

We submit that on the principles announced in the above authorities, particularly that of *French* v. *Barber Asphalt Paving Co., supra,* the question under discussion is not a federal question, but only a local one involving the construction of a state statute for the collection of special assessments; applicable to all persons in like circumstances and conditions; not discriminative between persons or classes

of persons within the municipality; and not violative of the Constitution or any law of the United States.

III.

The precise question involved in the first contention of counsel for plaintiff in error, that the Local Improvement Act of Illinois, of June 14, 1897, is unconstitutional, because it confers on the Board of Local Improvements powers which can only be vested in corporate authorities and that the Board of Local Improvements are not corporate authorities, was decided adversely to counsel's contention by the Supreme Court of Illinois in the case of Givens v. The City of Chicago, 188 Ill., 348, and we maintain that that decision of the Supreme Court of Illinois, which upholds the validity of the statute complained of, is conclusive upon this court.

In the case of *Givens* v. *City of Chicago*, 188 Ill., 348, the precise question was thus stated by the Supreme Court of Illinois (p. 350):

> "The most important objection made, however, and urged upon our attention, is that the act of June 14, 1897, entitled, 'An Act Concerning Local Improvements,' is unconstitutional and void because in conflict, as it is claimed, with Section 9 of Article 9 of the Constitution, which, on this subject, provides: 'The General Assembly may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment, or by special taxation or otherwise.'

> "The point made against the statute is that it undertakes to confer upon the Board of Local Improvements the power which the constitution provides shall be vested in the corporate authorities of the municipality, and that such a board is not such corporate authority."

After a carefully considered opinion, the court held, in substance, that the Local Improvement Act of Illinois of June 14, 1897, was not in violation of Section 9 or Article 9 of the Constitution of Illinois in providing for a Board of Local Improvements and permitting certain preliminary proceedings relative to the making of local improvements, to be performed under the authority of said Board, since a duly adopted ordinance by the City Council lies at the foundation of an improvement proceeding, and the Board is not vested with the power to adopt an ordinance.

In their opinion the court said in deciding this point (pp. 350-355):

> "This provision of the constitution is a limitation upon the power of the General Assembly to confer the same power upon any authorities or bodies other than the corporate authorities. (*Connell* v. *People ex rel.*, 107 Ill., 372.) And we have held in numerous cases that the corporate authorities upon whom the power of taxation may be conferred, within the purview of this provision of the constitution, are the authorities of the municipality who are either elected directly by the people to be taxed, or appointed in some mode to which they have given their assent. (*Cornell* v. *People, ex rel., supra; Wetherell* v. *Devine*, 116 Ill., 631; *Snell* v. *City of Chicago*, 133 *id.*, 413.) It seems clear without argument or citation of cases, that the Board of Local Improvements provided for in

the act of authorizing the creation of such board cannot be held to be the corporate authorities of the city or village, but that, as cities and villages are now organized and governed under the general law for the incorporation of cities and villages, their incorporate authorities are the City Council of the cities and the trustees of the villages. But it can be said that the statute in question purports to vest power in the Board of Local Improvements to make such improvements by special assessments, special taxation or otherwise? If it does not, the act is not unconstitutional simply because it provides for the creation of such a board and commits to it certain preliminary work, mainly in the line of ascertaining the facts necessary for the council to know before determining whether or not to provide for the making of the improvement and the levying of the assessment or special tax. An ordinance duly adopted lies at the foundation of the proceeding, and the board is not vested with any power to adopt an ordinance. That, under the statute, could in this case only have been done by the City Council of the City of Chicago. Before enactment of this statute the council might have required much of this preliminary work to be done by one of its committees, and while some of the former powers of the council in this respect have by the act been taken away and conferred on the board, still no power has been conferred on the board which by the constitution could only be vested in the council. It is certainly no violation of the constitution for the legislature to prescribe conditions to be complied with before the corporate authorities can make local improvements at the expense of the property owners. It has never been supposed that the provision applicable to cities of less than 25,000, (now 50,000, as amended), providing that no ordinance for such an improvement shall be adopted unless petitioned for by a majority of the owners

of the abutting property, was constitutional. In such a case the power to make the improvement or to levy the tax is not vested in such property owners, but the provision is a mere restriction upon the exercise of a power which, when unrestrained, had doubtless often been exercised with great injustice to and oppression of the property owner.

"Section 5 of the act is also a restriction upon the exercise of his power. It provides that no ordinance for such an improvement shall be considered or passed by the City Council or Board of Trustees unless it shall have been recommended by the Board of Local Improvements. If this board has performed its duties it is fully informed of the necessity of the work, of the nature, character and cost of the improvement, and of the views and interests of those whose property is to be assessed to pay for it, before it makes its report and recommendation to the City Council or Board of Trustees. The corporate authorities could not act intelligently in such matter without first having obtained the information which, under the statute, it is the duty of the board to obtain before any ordinance can be adopted by the council. Preliminarily, the property owners have been notified and afforded a hearing. This opportunity for the property owners to be heard, as a preliminary step in the proceeding, is one of the important provisions of the act. Former statutes contained no similar provision.

"It is claimed, however, the council or board of trustees has no discretion under the statute, but must adopt the ordinance as framed and presented by the Board of Local Improvements. This is a misapprehension of the act. Section 34 contains the only provision which makes it the duty of the corporate authorities to adopt an ordinance providing for the improvement recommended by the board, and that is confined to cases where the owners of the greater part of

the property in any one or more contiguous blocks abutting on the street or public place to be improved shall petition for the improvement. That section provides, among other things, that after the hearing before the board, and after it has determined the nature and cost of the improvement, it shall prepare and transmit to the legislative,—that is, to the corporate authorities—'draft of an ordinance therefor, together with an estimate of cost, * * * and shall recommend the passage thereof, which recommendation shall be *prima facie* evidence that all the preliminary steps required by law have been taken; and thereupon it shall be the duty of such legislative body to pass an ordinance for the said improvement, and take the necessary steps to have the same carried into effect.' This provision does not make it the duty of the council to pass an ordinance providing for the improvement because the Board of Local Improvements has recommended it, but because, primarily, the owners of the abutting property have petitioned for it. Nor is it made the duty of the council to adopt the 'draft of an ordinance' prepared and presented by the board, but only 'to pass an ordinance for the said improvement.' Clearly, this provision of the statute does not vest in such board the power to make the improvement and levy a special assessment or a special tax to pay for it. There is no other section of the statute, so far as we have discovered, which provides what the council shall do when it has received the recommedation of the board and the ordinance which it has prepared, except that Section 11 requires that where the estimated cost of the improvement exceeds $100,000 the ordinance shall be refered to the appropriate committee, and, with the recommendation and estimates, published, with proceedings of the council, at least one week, before any action shall be taken thereon. True, as before said, Section 5 con-

tains the negative provision that no ordinance for any local improvement to be paid for by special assessment or special taxation shall be considered or passed unless first recommended by the Board of Local Improvements. But as we construe the statute the City Council or Board of Trustees, may, in its discretion, refuse to pass an ordinance submitted and recommended by the local board, notwithstanding it may be that it must pass an ordinance for the improvement where such improvement has been petitioned for by the requisite number of property owners.

"That it was not intended by the legislature to vest the power to make local improvements by assessment or special taxation in the board created by the act is further shown by the first section, where, following, in the main, the language of previous acts, as well as the constitution, which has been previously construed by this court, it is provided 'that the corporate authorities of cities, villages and corporated towns are hereby vested with the power to make such local improvements as are authorized by law by special assessment, or by special taxation of contiguous property, or by general taxation, or otherwise, as they shall by ordinance prescribe.' We think it is evident that it was not the purpose of the General Assembly to vest these boards with power to make local improvements and to levy special taxes and assessments to pay for them, but rather, to create a municipal agency to ascertain and determine questions of a preliminary character, which the corporate authorities may not be so well able to ascertain and determine, and which, when so determined, operate as restrictions upon the exercise of the great power over the property of the citizen which the corporate authorities of municipalities possessed. Whether these boards do or will subserve the purpose of their creation does not affect the validity of the statute.

> "We are of the opinion that the statute does not violate the provision of the constitution above set out, in the respect mentioned."

In view of this express decision of the Supreme Court of Illinois holding that the provision of the Constitution of Illinois providing that the power of making local improvements may be conferred on "corporate authorities", has not been violated by the Local Improvement Act of Illinois, it is unnecessary to review the Illinois cases cited by counsel for plaintiff in error in respect to who constitute "corporate authorities."

The rule is well settled in this court that the construction of the Constitution and laws of a State by its courts is, as a general rule, binding on the Federal courts.

> *Forsythe* v. *Hammond*, 166 U. S., 506, 518.
> *Merchant's and Manufacturer's Bank* v. *Penna.*, 167 U. S., 461.
> *Schaefer* v. *Werling*, 188 U. S., 516, 517.

In *Forsythe* v. *Hammond, supra*, the court said (p. 518, 519):

> "The construction by the courts of a state of its constitution and statutes is, as a general rule, binding on the Federal courts. We may think that the Supreme Court of a State has misconstrued its construction or its statutes, but we are not at liberty to therefore set aside its judgments. That court is the final arbiter as to such questions."

In the case of *Schaefer* v. *Werling, supra*, where it was expressly decided by this court that the construction placed by the highest courts of a State on a State statute providing for paving streets and dis-

tributing the assessment therefor is conclusive upon this court, the court said (p. 517):

> "The case involves the validity of a statute of Indiana known as the 'Barrett Law' enacted in 1889 * * *. We deem it sufficient to refer to the opinion in *Adams* v. *City of Shelbyville, supra*, in which the Supreme Court of Indiana closed an elaborate discussion of the various provisions of the law in these words: 'We, therefore, conclude that section three, Acts 1889, Sec. 4290, Burns 1894, must be construed as providing a rule of *prima facie* assessment in street and alley improvements which allotments by the city or town engineer under Section six of said Act of 1889, Sec. 4293, Burns, 1894, are subject to review and alteration by the Common Council and Board of Trustees under Sec. 7 of said Act of 1889 as amended, Acts of 1891, p. 324; Acts 1899, p. 64; Sec. 4294, Burns 1894, upon the basis of actual special benefits received by the improvement: And that under said Section 7 the Common Council of the city or Board of Trustees of an incorporated town have not only the power but it is their imperative duty, to adjust the assessments for street and alley improvements, under said act, to conform to the actual special benefits accruing to each of the abutting property owners.'
>
> Of course, the construction placed by the Supreme Court of a State upon its statutes is, in a case of this kind, conclusive upon this court. *Forsyth* v. *Hammond*, 166 U. S., 506, 518 [and cases cited.] And with that construction the following recently decided cases, in which the matter of street assessment was fully considered, sustained the decision of the state court upholding the validity of the law [citing cases]."

IV.

The construction of Sections 42 and 86 of the Local Improvement Act of Illinois, of June 14, 1897, which counsel for plaintiff in error contends, in his second point, are unconstitutional "because they interfere with the right of contract by fixing the rate of interest on assesments and improvement bonds at five per cent.", involves a local, and not a federal, question and the interpretation placed on said sections by the Supreme Court of Illinois is, therefore, binding on this court.

The pertinent parts of Sections 42 and 86 of the Local Improvement Act of Illinois are respectively as follows:

> "42. (DIVISION OF ASSESSMENT INTO INSTALLMENTS—PAYMENT OF INTEREST.) It shall be lawful to provide by the ordinance for any local improvement, any portion of the cost of which is to be defrayed by special assessment or special taxation, or by ordinance passed at any time before the confirmation of the assessment roll, that the aggregate amount assessed, and each individual assessment, and also the assessment against the municiaplity on account of property owned by the municipality and for public benefits, be divided into installments, not more than ten (10) in number: Provided, however, that any such special assessment or special tax levy for building sewers, subways or viaducts may in like manner be divided into not exceeding twenty (20) installments. In all cases such division shall be made so that all installments shall be equal in amount, except that

all fractional amounts shall be added to the first installment, so as to leave the remaining installments of the aggregate equal in amount and each a multiple of one hundred dollars ($100) * * *.

All installments shall bear interest as hereinafter provided until, paid, at the rate of five (5) per centum per annum. Interest on assessments shall begin to run from the date of the first voucher issued on account of work done as aforesaid. * * *

86. Bonds to Anticipate Installments of Assessment. For the purpose of anticipating the collection of the second and succeeding installments, provided for in this act, it shall be lawful for such city, village or town, to issue bonds, payable out of said installments, bearing interest at the rate of five per centum per annum, payable annually and signed by such officers as may be by ordinance prescribed; said bonds shall be issued in sums of one hundred dollars, or some multiple thereof, and shall be dated and draw interest from the date of the issuing of the same. Each bond shall state on its face out of which installment it is payable, and shall state, by number or other designation, the assessment to which such installment belongs. The principal of such bonds shall not exceed, in the aggregate, the amount of such deferred installments, and shall be divided into as many series as there are deferred installments. * * *"

From a consideration of these sections it is manifest that the only conclusion that can be reached is that they form part of the general scheme provided by the Local Improvement Act of Illinois for collecting this species of taxation known as special assessments; that they do not discriminate between persons or classes of persons; that they prescribe no new or unusual methods in the procedure for col-

lecting special assessments, but that they simply provide that the property owner shall pay a certain rate of interest on the installments of his assessment, and that the city shall pay a corresponding rate of interest on the improvement bonds which it may issue to the contractor in payment for the improvement; and that these provisions are only the usual and customary ones which are ordinarily contained in special assessment acts.

It is apparent, we submit, that there is nothing in these provisions which could be construed as depriving a person of his property without "due process of law" or in violation of the "law of the land." But, as we have stated, they are only part of the procedure to collect special assessments; and, therefore, their construction involves only a local, and not a Federal question, the determination of which by the Supreme Court of the State will be conclusive upon the Supreme Court of the United States.

The Supreme Court of Illinois in their opinion in the present case, set out in the Transcript of Record, pp. 32-34, and reported in 213 Illinois, 452, on this point, say (pp. 455-456):

> "It is next contended that sections 42 and 86 of the Local Improvement Act, in accordance with the terms of which, by the ordinance, the assessment was divided into installments and bonds to anticipate the payment of the deferred installments were provided for to be issued, is unconstitutional, on the ground that the legislature had no authority to fix the rate of interest which said installments and bonds should bear, at five per cent. No authority has been cited to sustain that position. It is, however, urged that the effect of said sections is to de-

prive the property owner of his property without due process of law, in this: that the rate of interest on the deferred installments and bonds cannot be fixed at a lower rate by the city than five per cent., and it is said that the city, if untrammeled by the statute, might be able to issue and negotiate the same at a lower rate than that fixed by the statute. We cannot agree with the view of appellant, but are of the opinion of the legislature had the right to fix the rate of interest which said deferred installments and bonds, when issued, should bear, and that those sections of the statute are not in conflict with the constitution."

In the subsequent case of *Gage* v. *City of Chicago*, 216 Ill., 107, 109, 110, the Supreme Court of Illinois in again deciding this precise question, say (pp. 109, 110):

"The argument in support of the second proposition is, that the act of the legislature arbitrarily fixing the rate of interest on the installments, and also on the bonds, at five per centum per annum interferes with and denies to the city, as the representatives of the property owners, the right to make its own contracts, and is unconstitutional because it interferes with the freedom of the citizens and with their constitutional right to make their own contracts, guaranteed to them by the constitution. The purpose of the legislation authorizing the division of an assessment into installments payable in the future is to secure to the property owner an extension of time in which to pay the assessment. The property holder has no fundamental or constitutional right to have the payment of the benefits conferred on his property by the improvement deferred until a future period. It was entirely for the determination of the legislature whether such privileges should be secured for the property owner. The

earlier statutes of the State contain no provision for the division of the special assessments into installments. In legislating to confer this right or privilege the law-making body was not dealing with any fundamental or constitutional right of the taxpayer, and could lawfully, in providing for the extension of the time of payment, arrange for the payment of interest at a specified rate. (*Hulbert* v. *City of Chicago*, 213 Ill., 452.) Whether a fixed rate should be specified or a maximum rate per cent. which not be exceeded be named, was for the consideration and determination of the legislature. The legislature does not infringe the personal right of any property holder by compelling him to pay interest absolutely, but said section 42, as adopted in 1897 and as amended in 1903, provides that any person may at any time pay the whole assessment against his property or may pay any installment thereof, and thus the payment of interest may be wholly avoided or avoided in part, as the property owner may elect. *Village of Wilmette* v. *People ex rel.*, 214 Ill., 107."

The above decisions, we submit, are conclusive upon this court.

It will be observed that in both opinions, in sustaining the validity of the sections in question, the Supreme Court of Illinois considered them solely in relation to the Constitution of Illinois, and not in respect to the Constitution of the United States.

In neither opinion does the Supreme Court of Illinois even intimate that they were called upon to consider the question from the standpoint of the Constitution of the United States. It is reasonable to assume, therefore, that that feature of the question was not presented to that court in either case.

And in the present case this inference is strengthened by the fact that the assignments of error in the Supreme Court of Illinois do not specifically set up or claim that these sections are in violation of the Constitution of the United States. We submit, therefore, that it is extremely doubtful whether this question was properly called to the attention of the Supreme Court of Illinois so that it could be reviewed by this court.

But since it may be held that the federal question was properly presented in the assignments of errors in the Supreme Court of Illinois, and that, although the court decided the question only in respect to the Constitution of Illinois nevertheless that decision necessarily involved a Federal question, we will discuss the question on its merits.

V.

Sections 42 and 86 of the Local Improvement Act of Illinois of June 14, 1897, which counsel for plaintiff in error in his second contention claims are unconstitutional "because they interfere with right of contract by fixing the rate of interest on assessments and improvement bonds at five per cent.," confer no contractual rights whatever on the property owner, and, therefore, necessarily do not impair or abridge any such rights. But we submit that even if they did confer certain contractual rights upon the property owner, they would not impair such rights in providing for a fixed rate of

interest on installments of special assessments and special assessment bonds.

We submit, *first*, that Sections 42 and 86 of the Local Improvement Act of Illinois create no contract rights whatever in respect to a property owner; and, *second*, that granting they do create a contract in which the property owner has rights, they do not impair those rights in violation of either the Constitution of Illinois or of the United States.

First. That the sections in question do not confer any contractual rights on a property owner seems so clear to us that in our opinion argument is unnecessary. The language of the sections is not ambiguous or obscure, and a casual reading of them is sufficient to show that no contractual rights whatever are conferred on property owners in respect to the payment of interest on installments of special assessments and improvement bonds. Certainly it will not be contended that the obligation on the part of the property owner to pay the installments of the assessments and the interest thereon provided for by Section 42, creates a contract between him and the municipality; for, since special assessments are a species of taxation, this duty or obligation on the part of the property owner is nothing more than that which exists in respect to the payment of any other species of taxes or of general taxes.

And it is plain that Section 86 does not expressly or impliedly confer any contractual rights on the property owner in respect to the improvement bonds which the municipality is authorized to issue, and on which it may prescribe a rate of interest

at five per cent. Section 86 does not even make it mandatory on the part of the municipality to issue improvement bonds in payment of work, but leaves it entirely discretionary with the municipality whether such bonds may be issued. Even if it should be contended that a contract arises between a municipality and the bondholders when the bonds are issued, can it be reasonably maintained that the property owner is a party to such contract and has rights therein which are impaired because the statute prescribes a fixed rate of interest on such bonds?

Without pursuing further our argument on this point, we submit that it is manifest that the sections in question do not confer any contract rights on a property owner—certainly not expressly, nor even by the remotest implication or the most refined and technical reasoning. Whether the Legislature should have conferred such rights on the property owner is a matter entirely of legislative policy and expediency, which is not involved here. It seems to us that the logical complaint of counsel should be, not that the contractual rights of plaintiff in error are impaired, but that the Legislature has not conferred such rights.

Second. Assuming, for the sake of argument, that in some way unknown to us, the sections in question confer certain contractual rights on the plaintiff in error, we submit that, since the making of local improvements by special assessments is purely a statutory proceeding in respect to which the property owner derives only such rights as are granted and independent of which he has no rights

whatever, if the contention of counsel for plaintiff in error is true, it would follow that the statute which confers certain contractual rights on the property owners at the same time and by its own terms deprives him of those rights. But such a contention involves a manifest contradiction.

The only position for counsel for plaintiff in error to assume, therefore, is the impossible one that the contractual rights of the plaintiff in error which it is claimed are impaired by the sections in question, are *inherent rights* which exist independent of the Local Improvement Act of Illinois. In other words, counsel is forced to maintain that plaintiff in error possesses certain rights of contract in respect to the installments of special assessments and improvement bonds and the rate of interest thereon, which are independent of the statute, and which are guaranteed by that general clause of the Constitution of Illinois, and the Constitution of the United States which provides, in substance, that no person shall be deprived of life, liberty or property without due process of law. Such a contention amounts to an absurdity, when it is borne in mind that the scheme of making local improvements by special assessment is entirely statutory, and that the only rights which a property owner possesses in respect thereto are derived from the statute. But counsel has, nevertheless, asserted this proposition, and in support of it cites the following cases:

Ritchie v. *People*, 155 Ill., 198; *McChesney* v. *People*, 200 Ill., 140; *Adams* v. *Brennan*, 177 Ill., 194;

Millet v. *People*, 117 Ill., 294; *Frorer* v. *People*, 141 Ill., 171; *Bailey* v. *People*, 190 Ill., 28.

It is needless to say that none of these cases announces such a doctrine as contended for by counsel. In *Ritchie* v. *The People*, *supra*, and *McChesney* v. *The People*, *supra*, the right of contract referred to was that which exists between employer and employee. The case of *Adams* v. *Brennan*, *supra*, involved the validity of a contract between the Board of Education of the City of Chicago and a contractor, for the building of a school house. The cases of *Bailey* v. *The People*, *supra*, and *Millett* v. *The People*, *supra*, hold that the legislature cannot pass statutes which are of a discriminative character.

We further submit that the question under discussion may be considered from another standpoint, and that is the legislative power generally in respect to interest. Counsel claims that certain contractual rights of the plaintiff in error are impaired by reason of the fact that the sections in question fix the rate of interest at five per cent., and do not leave the municipality free to take advantage of a possible lower rate of interest which the market might afford. But since interest is solely a creature of statute,

Fowler v. *Harts*, 149 Ill., 582, 597.

Ins. Co. v. *Refrig. Co.*, 162 Ill., 322, 323.

City of Chicago v. *Allcock*, 86 Ill., 384.

I. C. R. R. Co. v. *Cobb, Blaisdell & Co.*, 72 Ill., 148, 152,

it is difficult to perceive on what theory it could be demonstrated that a property owner could acquire any positive rights to interest on special assessments and improvement bonds; still more difficult to understand how such rights could partake of contractual rights; and further still, equally puzzling to comprehend how such rights are guaranteed by the Constitution of the United States.

If we have correctly stated the rule that there are no common-law rights in interest, but that it is a subject over which the legislature has entire control, how can it be reasonably or intelligently argued by counsel for plaintiff in error that in fixing the rate of interest on installments of special assessments and assessment bonds, the Legislature of Illinois has impaired certain constitutional rights of plaintiff in error. He has only such rights in respect to interest which the statute gives him. And the legislature could either grant or withhold this right as it might deem expedient.

In conclusion, we submit that from whatever view the contention of counsel for plaintiff in error is considered, it appears absolutely unsound and unreasonable.

Respectfully submitted,

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Attorney for Defendant in Error.

CHARLES H. MITCHELL,
FRANK JOHNSTON, JR.
Of Counsel.

Supreme Court of the United States.

No. 248.—October Term, 1905.

Thomas H. Hulbert, Plaintiff in Error, vs. The City of Chicago. } In error to the Supreme Court of the State of Illinois.

[May 14, 1906.]

Mr. Justice McKenna delivered the opinion of the Court.

Error to the judgment of the Supreme Court of the State of Illinois affirming a judgment of the County Court of Cook County, confirming an assessment to defray the cost of paving a street in the city of Chicago.

The proceeding was commenced by a petition filed by the city in the County Court of Cook County in accordance with law of the State. The petition recited an ordinance of the city providing for the improvement of the street, and prayed "that steps be taken to levy a special assessment for said improvements in accordance with the provisions of said ordinance, and in the manner prescribed by law."

An order was made in accordance with the prayer. An assessment and report thereon were duly made with an assessment roll attached, which exhibited the property of plaintiff in error as assessed and the amount for which it was assessed.

In pursuance of notice given to all parties to file objections to the confirming of the assessment rule, plaintiff in error filed objections thereto. Among his objections were the following:

"Said act concerning local improvements, passed June 14, 1897, and all amendments thereto, are not only contrary to the constitution of Illinois, but they are also contrary to the Constitution of the United States and to the Fourteenth Amendment thereof.

"Said act concerning local improvements, said ordinance, which is the basis of the present proceedings, and all documents and orders relating thereto, are contrary to the Constitution of the United States, and to the Fourteenth Amendment thereof, because such act, ordinance, document and orders seek to deprive objector of property without due process of law.

"Said ordinance and proceedings are in other respects illegal, unconstitutional and void.

"The proceedings herein and said act are contrary to the Constitution of the United States, and to the Fourteenth Amendment thereof, because the petitioner herein, under and by virtue of said act and of said proceedings, seeks to deprive these objectors of their property without due process of law. Said proceedings and said act are also contrary to the Constitution of the United States, and to the Fourteenth Amendment thereof, for the reasons set forth in the several foregoing objections."

The case came on for hearing before the court, the right of a jury on the question of benefits having been expressly waived.

Petitioner (defendant in error) introduced the petition, assessment roll and notice. They were received in evidence, though objected to as not complying with or meeting the requirements of the statute.

Plaintiff in error to sustain the issues "on the question of the legal objections" offered in evidence the various resolutions and proceedings before the board of local improvements. They are set out in the record, but it is not necessary to quote them. No other evidence was offered. The court overruled the objections.

On the question of benefits the same evidence was offered by the respective parties. Plaintiff in error objected to the documents offered by the city on the ground that the ordinance was illegal and void, because the first resolution of the board of local improvements in regard to assessments did not contain an itemized estimate of the cost of the improvements made by the engineer, in the manner and form required by the statute.

The objection was overruled and the assessment confirmed with some modification not necessary to notice. The judgment was affirmed by the Supreme Court of the State.

The bill of exceptions shows that plaintiff in error did not bring to the attention of the trial court that the act of the State under which the assessment was made, or any of the proceedings, were contrary to the Fourteenth Amendment to the Constitution of the United States, nor did he assign as error on appeal to the Supreme Court that the rulings of the trial court or its judgments [illegible]nged that amendment.

All the questions submitted to the Supreme Court and all the questions passed on by it depended upon the construction of the statute or the compliance of the proceedings with the statute, except that it was contended that the sections of the act which provided for the division of the assessment into installments and the issue of bonds to anticipate the payment of the installments to bear five per cent interest was unconstitutional, in that the legislature had no power to fix the rate of interest, and that by so doing a lower rate of interest was prevented, and plaintiff in error thereby deprived of his property without due process of law. The court decided against both contentions, holding that "the legislature had the right to fix the rate of interest which said installments and bonds when issued should bear," and sections 42 and 86 of the local improvement act "are not in conflict with the constitution." That is, the constitution of the State.

We do not think that the plaintiff in error complied with section 709 of the Revised Statutes in setting up a right under the Constitution of the United States. The mere claim in the objections to the confirming of the assessment, never afterwards brought to the attention of the trial court or of the Supreme Court, was not sufficient. There is no evidence in the

record to show that the decision of either of the courts was invoked by plaintiff in error upon a right claimed under the Constitution of the United States.

It is urged that in the writ of error and petition for citation it is stated that certain rights and privileges were claimed under the Constitution of the United States, and that the Supreme Court of the State of Illinois decided against such rights and privileges, and, it is further urged, that the chief justice of the court allowed the writ of error. This is not sufficient. (*Marvin* v. *Trout*, 199 U. S. 212, 223.)

Nor was a right under the Constitution of the United States necessarily involved in the determination of the cause. And the Supreme Court was justified by its rulings in omitting the consideration of rights under the Constitution of the United States. According to the practice of the court an error not assigned is not open to review. (*Berry* v. *City of Chicago*, 192 Ill. 154, 155.) Errors assigned but not noticed or relied on in the brief or argument of counsel will be regarded as waived or abandoned. (*Keyes* v. *Kimmel*, 186 Ill. 109, 114.) And such rule of practice will be recognized by this court. (*Erie Railroad Co.* v. *Purdy*, 185 U. S. 148, 153.) It follows that this court has not jurisdiction of this writ of error. (*Oxley Stave Co.* v. *Butler Co.*, 166 U. S. 648; *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238; *Chapin* v. *Fye*, 179 U. S. 127.)

Writ dismissed.

True copy.

Test:

Clerk Supreme Court, U. S.